IMMIGRATION EMERGENCY POWERS

HEARING

BEFORE THE

SUBCOMMITTEE ON
IMMIGRATION AND REFUGEE POLICY

OF THE

COMMITTEE ON
THE JUDICIARY
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

OVERSIGHT HEARING TO REVIEW PRESIDENTIAL EMERGENCY POWERS WITH RESPECT TO IMMIGRATION

SEPTEMBER 30, 1982

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IMMIGRATION EMERGENCY POWERS

THURSDAY, SEPTEMBER 30, 1982

U.S. SENATE,
SUBCOMMITTEE ON IMMIGRATION AND REFUGEE POLICY,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 1:43 p.m., in room 2228, Dirksen Senate Office Building, Hon. Alan K. Simpson (chairman of the subcommittee) presiding.

Present: Senator Grassley.

Staff present: Richard W. Day, chief counsel; Donna Alvarado, counsel: Arnold Leibowitz, special counsel; and Valentine S. Jones, research assistant.

OPENING STATEMENT OF HON. ALAN K. SIMPSON, A U.S. SENATOR FROM THE STATE OF WYOMING, CHAIRMAN, SUBCOMMITTEE ON IMMIGRATION AND REFUGEE POLICY

Senator SIMPSON. Good afternoon. Today, we will hear testimony on the statute proposed by the administration, entitled the Immigration Emergency Act. It is designed to permit the United States to respond to a threatened mass migration of undocumented aliens to this country. It was the inability of the U.S. Government to respond effectively in the 1980 Mariel boatlift that resulted in confusion and embarrassment to the United States.

It is important that we be prepared to meet such an occurrence if it should again occur. A grant of any extraordinary powers to the Executive is always a very sensitive issue; it has been throughout the history of all countries. We must be most cautious to assure that the need exists and that the exercise of those powers is related to that need. These emergency powers provisions presented to us are intended to meet that demand and that standard.

So, today we will have with us representatives of the Government, experts from the academic community, and persons concerned with the rights of all persons in the United States. That should assist us in assuring a most careful review of this delicate area of emergency powers.

At this time, I would recognize my good colleague from Florida, who has been most alert and responsive and patient with regard to the emergency powers provisions. I appreciate deeply his assistance and the assistance of Senator Hawkins in awaiting the opportunity to deal with this separately from the Immigration Reform and Control Act of 1982, and I appreciate that.

STATEMENT OF HON. LAWTON CHILES, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator CHILES. Thank you, Mr. Chairman, and I want to commend you and the subcommittee for calling the hearing. You have certainly worked hard and successfully to correct the problems of our present immigration laws. The Senate has approved S. 2222, the immigration reform proposal that you put together, and hopefully we will see the House move on counterpart legislation before we finally adjourn.

I commend you for a job well done, and if that final passage comes about, I think you can take comfort in the knowledge that our Government is going to be in better control of its borders with respect to undocumented aliens. I certainly tip my hat to you for being able to put together the bill and being able to shepherd that bill to passage. You asked us at that time to be patient in regard to these emergency powers. We were.

Senator SIMPSON. Thank you.

Senator CHILES. I share your relief that a major part of the effort has been taken care of with Senate passage of legislation addressed to the problems of illegal immigration. By controlling the magnet of illegal jobs and by streamlining the immigration appeals procedures, our Senate bill is going to help, certainly, the steady flow of immigration.

There is still work to be done on another important immigration issue, and that is insuring that the United States has the ability to prevent any future flood of aliens, subject to what happened in the 1980 Mariel boatlift. I was outraged over the illegal immigration crisis that was triggered by Castro. It has disrupted south Florida. I saw my State struggle to bring some kind of makeshift order out of the chaos that was foisted upon us.

Education and public health services were strained beyond their capacity. State, local, and city budgets were drained. Stories of human suffering, tragedy, fear, and crime became everyday topics of conversation in Florida. Business declined; our people lost jobs. Tourists were discouraged by the acts of violence and the news of that, and neighbors began to distrust neighbors. Many were afraid to leave their homes, and many are armed today. As a consequence, the Miami area is known as the gun belt.

Needless to say, Floridians were disgusted not only with the situation itself, but more important with the Federal Government's sluggish response. Florida worked here in Congress and on the State and local level with Democrats and Republicans with two administrations just to get the Federal Government to acknowledge its responsibilities. We had some successes, but not all successes even there, and the job is certainly not over.

Mr. Chairman, I know you are familiar with the effects of the Mariel boatlift. I know you went to Dade County; I know you have talked and listened to the frustrations that are out there with the people themselves. You have seen what the boatlift and the undocumented Haitians have done to south Florida.

In a sense, the boatlift was similar to a war. It was a war that Castro fought, with unwitting people who wanted to be reunited with their families in Florida. Using those people, he emptied his

jails and some of his asylums, and forced all of those people onto boats and into our State. It really was a deliberate and premeditated act of invasion, literally, by a foreign country.

Our Government did not have the ability to respond to this form of war, and instead of a contingency plan in place that could be used to respond to those events and to take control of the situation, all we really had was confusion. Estimates of the cost to the United States taxpayer for what happened in south Florida run as high as $700 million. I do not know that we will ever know exactly what the costs were.

But I think it is essential that we prevent such an invasion from taking place again, and that invasion might not just be Miami this next time, Mr. Chairman. It could be any point that can be reached in the United States.

Since the Mariel crisis, I have joined with other Floridians to get the Federal Government to respond and to make sure that another Mariel could not happen. We have had some successes on the first front, but on the second front it becomes increasingly clear to me that unless the U.S. Government makes it clear that it has both the tools and the determination to prevent another Mariel-type situation from happening in the future, we would end up by encouraging the Castros of this world to wage that kind of war on us again.

Accordingly, I was prepared to offer the administration's proposal on emergencies as an amendment to S. 2222, but you convinced me not to do that at this time. And, of course, at that time, we were able to get the Justice Department to put on the record the powers that they now have, and those powers I do reiterate in my full statement and I would like to have that included as a part of the record. But in trying to save some time, I will not read those powers again.

Senator SIMPSON. They will be entered in the record, without objection.

[The following was received for the record:]

JUSTICE DEPARTMENT LISTING OF AUTHORITY

Sec. 212(f) of the Immigration and Nationality Act authorizes the President by proclamation to suspend the entry of all aliens or a class of aliens if he finds that their entry would be detrimental to the interests of the United States.

Under 50 U.S.C. 191, upon a Presidential proclamation a national emergency exists by reason of an actual or threatened disturbance of the international relations of the United States, the Secretary of the Treasury may make rules and regulations governing the anchorage and movement of any vessel, foreign or domestic, in the territorial waters of the United States; may inspect such vessels at any time and may in some cases, if necessary, take possession and control of such vessels.

8 U.S.C. 1324(b) provides for the forfeiture and seizure of any vehicle or vessel used to bring illegal aliens into the United States in violation of 8 U.S.C. 1324(a)(1) or used to transport aliens within the United States in violation of 8 U.S.C. 1324(a)(2).

50 U.S.C. App. 16 authorizes the forfeiture of any vessel used in violation of the provisions of the Trading of the Enemy Act, 50 U.S.C. App. 1 *et seq.* This provision was invoked in the recent Mariel boatlift and the District Court for the Southern District of Florida has held that vessels used in the Mariel boatlift are subject to forfeiture under this provision. While this provision would be available if there were another mass migration from Cuba, it would not be available if the migration were from a country other than one covered by the Trading of the Enemy Act.

19 U.S.C. 1581(e) authorizes the seizure of a vessel or vehicle which is subject to forfeiture or to secure any fine or penalty. It has been the government's position

that a vessel or vehicle used to bring illegal aliens into the United States in violation of 8 U.S.C. 1323 is subject to seizure in order to secure any fines levied.

Under general non-statutory authority, land traffic check points could be set up at reasonable locations for the purpose of stopping, warning and questioning vehicles that could be involved in facilitating the migration.

8 U.S.C. 1182(f), as noted, authorizes the President to suspend the entry of aliens or classes of aliens if it finds their entry would be detrimental to the interests of the United States. Pursuant to this provision, the President could authorize the stopping of United States flag vessels, stateless vessels, or with the permission of a foreign government, a foreign flag vessel carrying illegal aliens to the United States.

8 U.S.C. 1323 provides for civil penalties for bringing to the United States aliens without valid visas.

8 U.S.C. 1324 provides for criminal penalties for bringing into the United States aliens who have not been duly admitted by an immigration officer. However, in *United States* v. *Anaya*, the Court held that the provision does not prevent the mere bringing of undocumented aliens to this country's borders, but only the surreptitious landing of aliens.

50 U.S.C. App. 16 provides criminal penalties for persons violating its provisions and implementing regulations. Under 31 C.F.R. 515.415, the bringing of a Cuban national who does not have a valid immigrant or non-immigrant visa into the United States is prohibited.

Sec. 235(b) of the Immigration and Nationality Act provides for the detention until further examination can be conducted, of every alien who does not appear to the examining officer to be "clearly and beyond a doubt entitled to land."

Senator CHILES. I think it is important to note that there are powers that have been placed on the record. Another provision of the current law establishes penalties to anyone who tries to secretly bring illegal aliens into the country. But by listing those authorities, I do not want to suggest that there are no other provisions in current law which could be used by the Government, because I think there are others, in addition to those powers that I am listing now, within the powers of the President.

However, I agree with the administration that it makes sense for Congress to establish additional powers which could be triggered by an emergency situation. By doing so, I think we accomplish several important objectives.

First, we make sure that a single body of authority, approved by the Congress, is in place. Second, we eliminate any inconsistencies in the existing law and clarify any provisions that seem vague or obsolete. Third, by taking action, we put the Congress and the Federal Government on record of our determination to control immigration emergencies. By doing so, I think we send a clear signal both to the American people and to those of other countries that the Federal Government is not going to sit by idly in the future.

The proposal before us today is a revision of the earlier administration proposal, and I would like to have a few comments on the proposal. I think that the Attorney General does reassure me that there is sufficient authority at present to support a contingency plan. The proposed authority would be less cumbersome, though, and less likely to lend itself to abuse than the broader, sweeping powers of the current National Emergency Act.

I am delighted with the promise that an immigration emergency will allow the President to respond immediately to immigration crises, and it provides the President with the necessary tools to protect this Nation's borders.

The administration's new draft appears to be tightly drawn and better tailored to do the work than that that was first proposed. It sets standards by which the President can declare a national emer-

gency, requires prompt and reasonable notice to the Congress, mandates a timely sunset of the declaration, and gives flexibility in those Federal facilities that could be used for unforeseen circumstances. It cuts a lot of the redtape.

It acknowledges due process rights and minimizes as much as possible the devastating effects that governmental interference can have on innocent people going about their particular business. It seems to clarify the existing authority and to bring in sharper focus just what we in the Congress, who constitutionally wield the power to regulate immigration, wish to delegate to the executive branch in addition to the inherent powers that the Executive already holds.

I think that the proposal will complement and supplement what we have now. I would like to point out a few problems I see in the draft. It is not so much what the draft has in it, but what I think has been left out. I am concerned with provisions for financial assistance to impacted communities—a burden that we are still carrying in Florida. I think it should be clearly stated that such places deserve at least disaster area-type funding. Never again should a city or a State budget have to endure 2 years of shouldering a Federal burden without Federal help.

As I understand it, the bill allows the President to renew certain powers which are triggered by his declaration that an immigration emergency exists without any sort of notice to the Congress. This blanket extension of the broad authorities for what could be an indefinite period of time without any sort of review by the Congress could present problems.

For instance, the bill allows for environmental and historical preservation laws to be waived. I think that might be fine during the emergency. I also think that we need to set forth the waiver that is going to be for a limited period of time, and we may need to tighten up on that.

As I said earlier, these are my preliminary reactions to the proposal. I plan to look further at the different provisions, and hope to be able to share some of those reactions with you in the future. I also hope that we can get the views of our State and local officials on this proposal, because I think their cooperation is going to be essential.

But at the same time, I want to say that I certainly support this proposal. I think everything that is good in it far outweighs anything else. I applaud the administration's dedication to resolving the complex problems that are presented by mass migrations.

Mr. Chairman, it is interesting to note that 100 years and 1 month ago, Congress passed the first general immigration act. The Senators sat, as you and I do today, discussing the weighty problems that this issue presents. It is hard to close the door on the American dream to those who wish to embrace it, but it was their duty then, as it is our duty today, to weigh the welfare of the Nation against the prospective immigrant.

The courts upheld the power to regulate immigration several times after that first bill passed, and our Supreme Court has declared,

> It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the en-

trance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.

International agreements which we have entered into, such as the Convention on the Territorial Sea and Contiguous Zone, confirm that 90-year-old Supreme Court declaration. In fact, one article of that agreement specifically allows or justifies interference with foreign vessels within the 12-mile belt of high seas to prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea, and to punish infringement of the above regulations committed within its territory.

I am pleased that the administration has adopted a contingency plan. It is important that we move promptly. I again applaud you for your quick response, and the subcommittee for setting these hearings. I pledge to you my help in every way in trying to protect our shores.

Mr. Chairman, I would just ask that the rest of my statement be included in the record.

[The prepared statement of Senator Chiles follows:]

Prepared Statement of Senator Lawton Chiles

Mr. Chairman, I commend you and the Subcommittee for calling this hearing. You have worked hard and successfully to correct the problems in our present immigration laws. The Senate has approved S. 2222, the immigration reform proposal you put together. Hopefully, we will see the House move on counterpart legislation before we finally adjourn. I commend you for a job well done; and, if final passage comes about, you can take comfort in the knowledge that our government will be in better control of our borders with respect to undocumented aliens.

I share your relief that a major part of the effort has been taken care of with the Senate passage of legislation which addressed the problems of illegal immigration. By controlling the magnet of illegal jobs and by streamlining immigration appeals procedures, S. 2222 will help stop the steady flow of illegal immigration. But there is still work to be done on another important immigration issue, and that is insuring that the United States has the ability to prevent any future flood of aliens, similar to what happened during the 1980 Mariel boatlift.

I was outraged over the illegal immigration crisis, triggered by Castro, that has disrupted South Florida. I saw my state struggle to bring some kind of make-shift order out of the chaos visited upon us. Education and public health services were strained beyond their capacity. State, county, and city budgets were drained. Stories of human suffering, tragedy, fear and crime became everyday topics of conversation in Florida. Business declined, our people lost jobs, tourists were discouraged by the news of violence, neighbors began to distrust neighbors, many were afraid to leave their homes, and many more armed themselves to do so. As a consequence, the Miami area is now known as a "gun belt".

Needless to say, Floridians were disgusted.... not only with the situation itself, but even more with the Federal government's sluggish response. Florida worked here in Congress, on the state and local level, with democrats and republicans, with two administrations just to get the Federal government to acknowledge its responsibilities. We had some successes, but the job's not over.

Mr. Chairman, I know that you are familiar with the effects that the Mariel boatlift and the influx of undocumented Haitians had on south Florida. In a sense, the Mariel boatlift was similar to a war. It was a war which Castro fought by using people who simply wanted to be reunited with their families in America. Castro used those people as unwitting pawns, and used their desire for freedom as a way to empty his jails and his asylums. His cynical actions were in fact the deliberate and premeditated act of invasion by a foreign country. Our government did not have the ability to respond to his form of war. Instead of a contingency plan in place which could be used to respond to events and take control if the situation, all we had was confusion. Estimates as to the costs to the United States taxpayer for what happened in South Florida run to at least $700 million. It is essential that we prevent such an invasion from ever taking place again.

Since the Mariel crisis, I have joined with other Floridians to get the Federal government to respond to the crisis which its lack of policies created, and to make sure that another Mariel would never occur. We have had some successes on the first front, although not as many as we would like to have seen. On the second front, it became increasingly clear to me that unless the United States government made it clear that it had both the tools and the determination to prevent another Mariel type situation from happening in the future, we would end up encouraging the Castros of this world to wage war on us once again.

Accordingly, during the Senate's consideration of S. 2222, I was prepared to offer the Administration's proposal on immigration emergencies as an amendment to the bill. However, after talks with the Justice and State Departments, and with you, Mr. Chairman, I agreed to defer my amendment so that S. 2222 could move along.

In the course of those discussions, we were able to get the Justice Department to set out on the record those provisions in existing law which would enable the United States government to take the steps necessary to prevent another Mariel. I would like to submit that listing of authority which the Justice Department provided

to us as part of the legislative record we are building today. I also think that it is worth spending a few moments mentioning some of those provisions.

* A provision in Title 50, United States Code, enables the Treasury Secretary, pursuant to a declaration of a disturbance in our foreign relations by the President, to inspect and even take possession of any ships, foreign or domestic, in our territorial waters.

* A provision in Title 8, United States Code, for the forfeiture and seizure of any vehicle or vessel used to bring illegal aliens into the country.

* Another provision enables the President to suspend the entry of aliens or classes of aliens into the United States if their entry would be detrimental to the interests of the United States. This could be used to stop any vessel carrying illegal aliens.

* Yet another provision of current law establishes penalties for anyone who tries to secretly bring illegal aliens into the country.

However, I agree witht the Administration that it makes sense for Congress to establish additional powers which could be triggered in an immigration emergency situation. By doing so, we accomplish several important objectives. First, we make sure that a single body of authority, approved by the Congress, is in place. Second, we can eliminate any inconsistencies in existing law, and clarify any provisions which seem vague or obsolete. Third, by taking action, we put the Congress and the Federal government on record in its determination to be in control of any immigration emergencies. By doing so, we send a signal both to the American people and to those in other countries that the Federal government will not stand idly by in the future.

Mr. Chairman, by listing these authorities, I do not want to suggest that there are no other provisions in current law which could be used by the government to respond to immigration emergencies. I believe that it is important, however, that we make it clear on the record at this point that there is authority to respond to immigration emergencies and that the Administration has developed a contingency plan based on current law to deal with such emergencies.

The proposals before us today is a revision of the earlier Administration proposal which I had planned in connection with S. 2222. Let me offer some comments on the new proposal. Just as before, I think it is imperative that we strengthen our present authority and so, again, I will be more than willing to support the Administration's proposal in its revised form.

The accompanying letter by the Attorney General reassures me that, though there is sufficient authority at present to support a contingency plan of decisive action by the President in the event of another mass influx of immigrants, the proposed new authority would be less cumbersome and less likely to lend itself to abuse than the broader-sweeping powers of the current National Emergency Act.

I am also delighted with the promise that "The Immigration Emergency Act will allow the President to repond immediately to immigration crises" and that it provides the President with the necessary tools to protect this nation's borders.

The Administration's new draft appears to be tightly drawn and better tailored to do the work of controlling our borders in times of threatened mass entries than what was first proposed as an amendment to S. 2222. It carefully sets standards by which the President may declare an immigration emergency. It rightfully requires prompt and reasonable notice to the congress once such an emergency is declared. It mandates a timely sunset of the declaration. It gives a flexibility in those Federal facilities and agencies to be used as need be for unforseeable circumstances. It cuts through the usual red tape and across the territories of bureaucracies. It acknowledges due process rights and minimizes as much as possible the devestating effects that governmental interference can have on innocent people going about their everyday business.

The proposal seems to clarify existing authority and to bring into sharper focus just what we the Congress, who constitutionally wield the power to regulate immigration, wish to delegate to the executive branch in addition to the inherent powers the executive already holds in that area. Generally speaking, and based upon a brief study of the draft, I think the new proposal will complement and supplement that which we have now; however, I would like to point to some possible problems in some sections of the draft.

I worry not so much with what the draft has in it, but what has been left out. I am concerned basically with provisions for financial assistance to impacted communities, a burden we are still carrying in Florida. It should be clearly stated that such places deserve, at least, "disaster area" type funding. Never again should a state or city budget have to endure two years of shouldering a Federal burden without Federal help.

As I understand it, the bill allows the President to renew certain powers which are triggered by his declaration that an immigration emergency exists without any sort of notice to the Congress. This blanket extension of the broad authorities for what could be an indefinite period of time, without any sort of review by the Congress, could present problems. For instance, the draft bill allows for all environmental and historical preservation laws to be waived during a declared immigration crisis. This is consistent with the need to make sure that emergency efforts during a crisis are not delayed. However, we need to make it clear that such waivers would be related to the need to respond to the special conditions created by the crisis. Notice to Congress is required by the bill each time the President extends a declaration of emergency. So too should notice be required when the President extends exemptions to environmental protection laws. Such notice will guard against abuse by allowing timely inquiries and intervention by Congress.

As I said earlier, these are my preliminary reactions to this proposal, I plan to look further into the different provisions in the proposal, and would hope to be able to share some of my reactions with you in the future. I also hope that we can get the views of our state and local government officials on this proposal.

Cooperation among Federal, state and local governments will be essential in any immigration emergency, and consultation at this early stage will help promote cooperation during a time of crisis.

By these few concerns of mine, I do not want to leave the impression that the proposal does not have my support. It does. All who have worked on the bill should be very proud of it. I heartily support it and applaud the Administration's dedication to resolving the complex problems presented by mass migrations.

Mr. Chairman, it is interesting to note that one hundred years and one month ago, Congress passed the first general immigration act. Senators sat as you and I do today discussing the weighty problems that this issue presents. It is hard to close the doors of the American dream on those who wish to embrace it. But it was their duty, as it is our duty today, to weigh the welfare of the nation against that of the prospective immigrant. the courts upheld the power to regulate immigration several times after that first bill passed and our Supreme Court has declared:

> "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."

International agreements which we have entered into...such as the Convention on the Territorial Sea and Contiguous Zone...confirm that ninety year old Supreme Court declaration. In fact, one article of that agreement specifically allows or justifies interference with foreign vessels within the twelve mile belt of high seas next to territorial seas to:

(a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;

and

(b) Punish infringement of the above regulations committed within its territory or territorial sea.

I am pleased that the Administration has developed a contingency plan under existing law as well as draw the draft which is before us today. It is important that we move promptly and in concert on this important legislation. The quick response that you, Mr. Chairman, and the Subcommittee have shown in setting these hearings assures me of your commitment to this goal. I pledge my help in any way possible to strengthen our resolve and our existing authority to protect our shores from future wars - like the one Castro waged against us during Mariel. We must assure the people of Florida that they will not be made to suffer such an invasion again. We must assure our country that we have a plan, that we are again in control of our borders, and that we are ready no matter what the crisis. Above all, we must let the rest of the world know that we will never sanction a loss of control of our sovereignty.

Thomas Enders, our Assistant Secretary of State, underscored the importance of the notion of deterrence when he testified earlier to the Judiciary Committee in support of a contingency plan. He said, and I quote:

> "Castro, and the Cuban people, must be in no doubt or uncertainty about the nature of our response to a new Mariel. If they believe we are unprepared to handle an illegal immgration emergency; if they believe we will waver between attempting to stop the migration and welcoming it; if they believe we will in the end welcome the arrivals and resettle them in American communities, then the temptation to deal us another blow will be very great."

Mr. Chairman, I agree with Secretary Enders that it is absolutely essential that the United States government make it clear that we have both the determination and the tools to prevent another Mariel from occuring in the future.

Thank you.

* * * *

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Senator SIMPSON. We have a rollcall vote; it is the vote on the criminal package. And with your lapel pin today, I think we should go over. I see you have handcuffs there. What is the symbolism of that?

Senator CHILES. Well, I thought maybe today was going to be crime day in the Senate, Mr. Chairman. It is a day that I have been waiting on for about 4 months now.

Senator SIMPSON. I believe you are a cosponsor of this measure coming up. Is that correct?

Senator CHILES. Yes, I am.

Senator SIMPSON. I thank you, and I want you to know that we will address—and I pledged that we would do this—we will address the issue of the financial responsibility and the importance of seeing that that is removed from a community that cannot respond to it.

We will direct our attention to financial impacts and planning and the impact issue. I thank you, and we will recess now for about 10 minutes.

[Whereupon, the subcommittee stood in recess from 1:59 p.m. to 2:14 p.m.]

Senator SIMPSON. The committee will come to order, and we will now have testimony from the administration. We have Commissioner Al Nelson, Commissioner of the Immigration and Naturalization Service, accompanied by Renee Szybala and David Hiller of the Department of Justice.

Let me say that should Senator Hawkins arrive at the hearing we will accommodate her. The missing children legislation, which has been a very important thing to her, is having a conference committee meeting and she is participating in that. She will be here as soon as she can.

When she should arrive, we will interrupt for 5 or 10 minutes to take her statement. For now, Al Nelson, it is good to have you here, as always. I appreciate your cooperation and assistance to the subcommittee.

STATEMENT OF ALAN C. NELSON, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEPARTMENT OF JUSTICE, ACCOMPANIED BY DAVID HILLER, ASSOCIATE DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, AND RENEE L. SZYBALA, DEPUTY ASSOCIATE ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Mr. NELSON. Mr. Chairman, thank you very much. Again, it is a pleasure to be here before you. Of course, we would be happy to yield when Senator Hawkins arrives.

We would like to repeat the introductions of David Hiller, the Associate Deputy Attorney General, and Renee Szybala, Deputy Associate Attorney General, who are at my side. I would like to acknowledge their contribution within the Department of Justice on immigration matters, in legislation, litigation, and all immigration matters. So, I am very pleased to have them with me and will be happy to have them respond to the questions that I know the chairman will have.

On behalf of the administration, it certainly is a pleasure to testify in support of the immigration emergency legislation. As you know, it was part of the administration's earlier package, and we do feel that it is appropriate, as you are doing, to consider it here in this hearing.

As the Attorney General stated a little over a year ago, this country has lost control of its borders, and there is no better example of that than the 1980 Mariel boatlift, wherein 125,000 Cubans within a space of a few weeks had a mass influx into the United States. Senator Chiles has addressed that and you did, Mr. Chairman, in your opening remarks, and that certainly is a key example for all of us.

It is essential that this Government never again permit our immigration policy to be set in Havana or any other foreign capital. While we have detailed contingency plans, this can help us administratively. Certainly, the Simpson-Mazzoli legislation which is moving through the Congress can strengthen and close many of the loopholes, and will streamline exclusion and asylum proceedings.

Nevertheless, we feel there is a need to additionally clarify and enhance the President's authorities in the event of a future immigration emergency, and for that reason, we propose this legislation.

We certainly need not sacrifice—and I know it is obviously a very strong concern to you and to the Judiciary Committee and to this administration that we not in any way sacrifice our liberties in the pursuit of preparedness for any immigration emergency. But, also, the Government cannot in any way continue to limp along with legal authorities that have proved to be inadequate during the Mariel boatlift. If we are to be responsible, we must learn from the prior painful experiences and act to prevent their recurrence.

While existing legislation can be used in many ways, there are ambiguities in that legislation. There is some confusion as to what can and cannot be done under existing legislation. There is certainly the open door to increased litigation that clouds the efforts. The problem in any emergency is the ability to move quickly, and we must avoid hesitation when faced with uncertainty.

Also, these existing laws are scattered through various titles in the U.S. Code. All are designed for other emergencies, and therefore, for the sake of clarity, we feel it is important to reestablish in this proposed legislation the authority that we seek.

The proposed legislation remedies many of these problems. It sets forth clearly what the President can do and the procedures. We also think that the procedures set forth in the new legislation can actually prevent a larger use of Presidential powers than might be necessary under existing legislation, and this will allow a more minimum and directed approach, should one of these unhappy circumstances of a mass immigration emergency occur.

The emergency bill has seven sections. I will not go through all the details of those, since our full testimony has been submitted for the record. This legislation sets forth the criteria where, under an immigration emergency, if certain conditions exist, the President can make a determination; that is, that a substantial number of undocumented aliens are about to embark for the United States; that the existing procedures of the Immigration and Nationality Act and the resources thereunder are inadequate. And the third cri-

teria is that the expected influx would endanger the welfare of the United States or particular communities.

There are procedures wherein the President must notify the Congress within 48 hours of his reasons, and publish the proclamation and other procedures in the Federal Register. There are provisions for extension of that, but again under substantial controls.

There are some who would raise questions as to some of the words used, such as "substantial numbers of aliens." We think those words, while they are somewhat inexact, must be, to allow some flexibility, and we think those words are appropriate.

Clearly, the new legislation is not intended to apply to the existing, normal—if there is such a thing—flow of border crossings, but clearly to the substantial and sudden increases that come along.

Under some of the powers specified, the President could restrict or ban vessels, vehicles or aircraft from traveling to a foreign country specifically designated by him, unless there is certain approval under some licensing provisions. This, we want to emphasize, Mr. Chairman, applies to conveyances not to persons. Certainly, the ability of individuals to travel will be maintained.

We want to emphasize that there is a substantial difference constitutionally between the right of individuals to travel within the United States, which we all hold very sacred, and the right to travel outside U.S. boundaries. The *Haig* v. *Agee* Supreme Court decision in 1981 deals with the ability to regulate outside travel, subject to due process limitations. And we think the provisions of this act, Mr. Chairman, clearly meet any due process considerations, with the licensing procedures and judicial review procedures very narrowly limiting any travel to a specific influx of illegal aliens.

Likewise, there are provisions regarding banning the travel of vehicles outside the United States or to a designated country for the expressed purpose of bringing in any mass influx of illegal aliens.

Certainly, the steps that this legislation addresses must be taken prior to any boatlift such as the Mariel occurrence or any other mass influx, and that is, of course, the expressed purpose of this legislation, to be ready in the event that it does occur. Hopefully, that contingency will not come to pass.

Also, the new law does, as I think Senator Chiles mentioned in his comments, temporarily exempt some of the emergency-related activities from environmental restrictions. We feel that in the Fort Allen situation and the Mariel boatlift where there were environmental attacks, it made it very difficult to get the camp ready to detain aliens. There was much delay, even though there have been no environmental problems.

Again, there are clear and narrow guidelines under which the environmental laws can be waived, and, in addressing one of Senator Chiles' questions, clearly for the period of the emergency. We think it is appropriately and narrowly drafted to allow the waiver for the temporary period of the environmental laws, and certainly to avoid the negative impact of breaching any environmental laws.

There are provisions regarding the detention of illegal aliens. We think, again, the authorities are important to clarify. We think

that while there is existing authority for detention, this act does further clarify those and avoids potential challenges.

Similarly the bill does indicate that the President has the power to designate appropriate agencies of the Federal Government to be involved in handling immigration emergencies, including components of the Department of Defense to provide assistance. The language here can avoid some potential Posse Comitatus Act difficulties.

The act provides for specified civil and criminal penalties. And again, addressing Senator Chiles' concerns, we realize funding is always a question, and this was a problem, to a degree, in the Mariel boatlift. We believe, the question of who is going to pay exists and should be addressed. So, the act authorizes a contingency fund of $35 million to cover the costs of such an immigration emergency.

I think in conclusion, Mr. Chairman, we have all addressed in the many hearings you have held, the essential nature of immigration in the United States and that we are a nation of immigrants. But it must be controlled. The Simpson-Mazzoli legislation represents a great step forward in controlling illegal immigration and making legal immigration more efficient.

But, nevertheless, we recognize that illegal immigration of a mass nature can take the extraordinary form of one of these emergencies, such as the Mariel boatlift, and that we must never again be unprepared for such an event. We think the enactment of this legislation will clarify the President's power to prevent and deal with any future mass immigration emergency. Even if the need to invoke the provisions never arises, which we certainly hope, the enactment of such a law would do much to demonstrate our resolve and discourage a repeat of such history. We urge this committee to give this bill its immediate attention.

Thank you, Mr. Chairman, and we will be pleased to respond to any questions.

[The prepared statement of Alan C. Nelson follows:]

PREPARED STATEMENT OF ALAN C. NELSON

I am pleased to appear before you today to discuss the Administration's proposed Immigration Emergency Bill.

In his testimony before this Subcommittee on July 30, 1981, the Attorney General stated that our country had lost control of its borders. There is no better example of this than our failure to prevent, and our lack of readiness to deal with, the 1980 Mariel boatlift. During Mariel, our country experienced the mass influx of some 125,000 Cubans in the space of a few weeks. The need to assimilate such a large number of undocumented aliens, in a short time, placed a tremendous strain on the resources of the communities of South Florida where most of the newly arrived Cubans settled. In addition, some of those who arrived during the Mariel boatlift were criminals who had been expelled from Cuban prisons by a hostile and cynical dictator. Many of these individuals are still in federal custody, pending return to Cuba which has thus far proven impossible.

It is essential that this country regain control of its borders. We can never again permit our immigration policy to be set in Havana or any other foreign capital. To ensure against this, the Administration has prepared detailed contingency plans to permit a swift and firm response in order to help prevent and deal with any future Mariels. Additionally, the Simpson-Mazzoli Bill, which has already passed the Senate and is now being considered in the House, would strengthen and close loopholes in our laws which prohibit bringing undocumented aliens to the United States. Also, the procedural reforms provided by that legislation to streamline exclusion and asylum proceedings would be critical in the event of another mass immigration emergency.

There remains, however, a need to clarify and enhance the President's authorities in the event of a future immigration emergency. The proposed Immigration Emergency Bill has been

drafted to meet that need. Its interrelated provisions represent the result of an intensive study and effort by the agencies concerned. These provisions have been carefully and narrowly drawn, so as to minimize any disruption of normal and legitimate activities. We need not sacrifice our liberties in the pursuit of preparedness. But neither can our government continue to limp along with the legal authorities that proved to be inadequate during the Mariel boatlift. If we are to be responsible, we must learn from our prior painful experiences and act to prevent their recurrence.

For several reasons, existing legislation should be improved and supplemented to help us effectively deal with any future Mariel-type situations. Existing legislation, which is not tailored to this problem, in many cases does not give the President the specific powers needed to deal with another mass immigration emergency. Because of the ambiguity in existing legislation there may be confusion as to what can and cannot be done. This ambiguity could foster needless, time-consuming litigation and hesitation which, in some cases, might interfere with the government's taking necessary action which is believed to be authorized. The existing emergency powers which the President might consider invoking should another Cuban flotilla situation arise are scattered throughout various titles in the United States Code. They were designed for other emergencies and were drafted with those other problems in mind. Therefore, it is not always clear from the face of these provisions that they would apply in a mass immigration problem.

Many different types of problems potentially exist due to poorly tailored or cumbersome existing emergency powers. For example, if another Mariel boatlift were to occur today, the President could very well deem it necessary to restrict and regulate the movement of certain classifications of vessels. Under current authority, he could accomplish this by declaring a

national emergency under 50 U.S.C. §191 and ordering certain ports to be closed. The difficulty is that such action could have consequences well beyond those that are intended or needed to halt a new flotilla. The closure of ports would, needless to say, cause severe hardship for many individuals. The President, however, might have no other choice under existing law if he were determined to prevent another large influx of undocumented aliens to the United States.

The proposed legislation remedies such problems. It sets forth specifically and clearly what actions the President can take. And those actions are carefully tailored to what might be required in an immigration emergency. Consequently, it would assist the government in planning and acting in response to another Mariel crisis or similar situation, and the legality of actions taken would be less subject to question. It would mean that in the context of a crisis those employing emergency powers and those subject to the restrictions would know without any doubt that the powers are being properly invoked and exercised.

The enactment of the proposed Immigration Emergency Bill, for example, would give the President other powers which he could could use to control vessel movement to the minimum extent necessary in the event of a declared emergency, and the closure of ports under 50 U.S.C. §191 to achieve this result would most probably be unnecessary.

The proposed Immigration Emergency Bill also supplements the powers of the President under existing law where necessary. One example of this, which I will discuss in more detail later, is the authority temporarily to exempt emergency related activities from certain environmental restrictions that might otherwise be invoked to block necessary actions.

Thus the bill is a comprehensive one designed specifically for a mass immigration emergency. It would satisfy the need for more comprehensive and clearer authorities to facilitate the prevention and handling of any future crisis.

The Immigration Emergency Bill is arranged in seven sections. The first of the major sections, 240A, concerns the declaration of an immigration emergency. Under the Bill, the President could declare an immigration emergency if three conditions exist. The President must determine: (1) that a substantial number of undocumented aliens are about to embark or have embarked for the United States; (2) that the procedures of the Immigration and Nationality Act or the resources of the Immigration and Naturalization Service would be inadequate to respond to the expected influx; and (3) that the expected influx of aliens would endanger the welfare of the United States or of any United States community. The President must notify Congress, within 48 hours, of his reasons for declaring an emergency, and publish the declaration in the Federal Register as soon as practicable.

The phrase "a substantial number of aliens" is necessarily inexact. The President could not be expected to have precise estimates of the number of undocumented aliens who may be about to travel to the United States. The term "substantial number" would clearly permit the declaration of an immigration emergency in response to a situation such as the 1980 Cuban boatlift, in which well over 100,000 aliens came to the United States. It is not, however, intended that declarations of emergencies be limited to situations involving the exceptionally large numbers associated with that boatlift. Rather, it is anticipated that an immigration emergency could be declared even if only a few thousand aliens were expected to arrive over the course of several weeks. Consequently, key factors in assessing the need for invoking these emergency powers are the adequacy of the response that could be made using the normal procedures of the Immigration and Nationality Act, the available resources of the Immigration and Naturalization Service, and the short and long term effect the influx would have on the welfare of the United States. On the other hand, while serious problems exist with respect to the

usual daily illegal border crossings, such activity would not lead to the declaration of an emergency absent other exceptional circumstances.

The emergency would last for a period of 120 days after its declaration, unless ended sooner by the President. The President could extend it for additional periods of 120 days if in his judgment the conditions previously described still existed.

The declaration of an immigration emergency would enable the President to invoke some or all of the powers specified in Section 240B of the Bill. Under the first of these, the President could restrict or ban vessels, vehicles or aircraft subject to United States jurisdiction from travelling to a foreign country specifically designated by him, unless such travel has been approved under the Bill's licensing provisions. The provision applies to United States conveyances rather than to persons, and individuals would be free to travel to the designated foreign country as long as alternative means, such as foreign common carriers, are used.

This provision will have an impact on the constitutionally protected right to international travel. The Supreme Court has noted, however, that there is a substantial difference between the right to travel within the United States and the freedom to travel outside the United States. While the former is virtually unqualified, the latter is not. As stated by the Supreme Court in Haig v. Agee, 453 U.S. 280 (1981), the right to travel outside the United States can be regulated subject to due process limitations.

The proposed bill provides the requisite due process by establishing a licensing procedure in Section 240C under which travel to the designated country would be approved where adequate safeguards existed to insure that the legitimate interests of the United States are protected. Full judicial review of licensing denials would be available. Under this provision, all common

carriers or aircraft, for example, could receive a blanket exemption from travel restrictions if such travel would not result in the arrival of a large number of visaless aliens. The authority to restrict travel is thus tailored to address the perceived harm, namely, the influx into the United States of a substantial number of undocumented aliens.

Section 240B would also enable the President to ban the transportation, on vessels, vehicles or aircraft subject to United States jurisdiction, of aliens who are of a particular nationality or who are travelling from or through a designated foreign country. Once again, permission for such transportation could be obtained through the licensing provisions of Section 240C. This transportation provision, although related to the previously discussed travel provision, is independently important. The intent of the travel provision, for example, could otherwise be defeated by vessels which pick up, at some third country, undocumented aliens from the designated foreign country. In addition, the transportation provision would assist in law enforcement efforts by permitting enforcement actions to be taken if aliens of the pertinent nationality were found on board, without the necessity of establishing that the vessel had traveled to the designated country. Finally, it would give the President flexibility during an emergency and permit him to invoke only the transportation provision, rather than the broader travel provision, if he believed such action was sufficient.

The need for such powers over travel to designated foreign areas and transportation of undocumented aliens of a particular nationality was clearly demonstrated by the 1980 Cuban boatlift. During the boatlift, residents of the United States provided the means of transportation for the Mariel Cubans. There was little our government could do until the vessels returned from Mariel harbor crowded with undocumented aliens. In any future mass immigration threat, steps must be taken to thwart a boatlift

before large numbers of undocumented aliens arrive in the United States. The proposed provisions would enable the federal government to respond more effectively to future mass migrations by giving the President specific power to prohibit residents of the United States from taking actions to aid the aliens in their efforts to reach our shores. It would not only permit enforcement action to be taken later against those whose actions made a mass migration possible, but would also provide the tools necessary to prevent a Mariel-type situation from occurring in the first place.

Thus, for example, an operator of a vessel could be arrested and his vessel seized before it reached foreign shores if there were probable cause to believe he intended to violate the travel ban. Of course, a vessel operator would be permitted to proceed with his lawful business in the absence of adequate justification to believe he was attempting to violate the law. Moreover, the experience gained by law enforcement authorities during the 1980 boatlift will better enable officials to make the determinations necessary to distinguish legitimate activities from violations of the emergency powers.

Section 240B also permits the President to prevent the arrival in the United States of undocumented aliens coming from the designated country during a declared emergency. The President could bar any vessels, vehicles and aircraft, for which the United States has jurisdiction, including those of a foreign flag, which are carrying such aliens from entering areas over which the United States exercises any customs, fiscal, immigration or sanitary jurisdiction. In addition, consistent with our international legal obligations concerning refugees, the undocumented aliens on a vessel, vehicle or aircraft subject to the jurisdiction of the United States could be returned to the country of origin or to some other reasonable location.

During the Mariel boatlift, once the undocumented aliens were on the boats, little if anything was done to prevent them

from arriving on our shores. Under Section 240B, vessels subject to the jurisdiction of the United States can be required to return the aliens to the country from which they came or to some other reasonable location. Also, foreign flag vessels carrying undocumented aliens can be prevented from entering waters over which the United States exercises jurisdiction. It must be recognized, however, that returning the vessels or the aliens may be impossible if the foreign power is truly hostile to their return. Consequently, stopping vessels from reaching foreign shores in the first place is critical.

Section 240B, as previously mentioned, also authorizes the President to temporarily exempt emergency related activities from environmental restrictions. In addition to referring to existing Presidential exemption authority under the Clear Air, Clean Water, Safe Drinking Water, Resource Conservation and Recovery, and Noise Control Acts, the provision would include new exemption authority with respect to other major federal, state and local environmental requirements. Such new authority could be exercised only upon a Presidential finding, transmitted to Congress, that an exemption is necessary to respond to an immigration emergency. The temporary exemption would lapse upon the termination of the emergency. It could be continued by the President, in increments not to exceed one year, if he determines that circumstances related to the immigration emergency make it necessary. The President could also require that some or all of the environmental standards be met without creating a private right of action to enforce the requirement. This would permit the President to insure that the environment is protected to the maximum extent possible without risking debilitating litigation in the course of an immigration emergency.

It is often necessary during a crisis to act quickly and decisively and to temporarily reorder priorities. During the Mariel boatlift, a Federal District Court issued an injunction

on environmental grounds blocking the transfer of Cuban arrivals to Fort Allen, Puerto Rico for processing. The court action came only after millions of dollars had been spent to ready Fort Allen, and seriously disrupted government planning efforts. The eventual transfer of aliens to Fort Allen almost one year later has apparently had no adverse environmental impacts. While the proposed Immigration Emergency Bill envisions compliance with environmental safeguards to the extent possible, the temporary exemption authority it provides could prevent the government from being thwarted in taking the steps that are essential in responding to the problems that inevitably arise during such a crisis.

In addition, Section 240B of the proposed bill reiterates and clarifies the government's authority to detain illegal aliens who come into custody as a result of an immigration emergency. The bill anticipates that an alien's admissibility to the United States will be determined under the existing provisions of the Immigration and Nationality Act. It makes it clear that the Attorney General has complete discretion to determine whether an alien is to be paroled pending a determination of his admissibility or his deportation if he is found excludable. It also makes clear the Attorney General's discretion to determine where such aliens will be detained, including in federal or state prisons or in local facilities if appropriate. The language of this subsection is intended to permit indefinite detention of an alien found to be excludable if no country is willing to accept him, such as occurred in the Cuban boatlift. This specific authority is necessary so there can be no doubt regarding the power of the United States to protect the public by detaining any or all of the arriving aliens during an emergency, as circumstances warrant.

The Attorney General's decisions under this subsection as to whether or where an alien should be detained are not subject to judicial review. A detained individual can, however, obtain habeas corpus review on the issue of whether he falls within the category of aliens subject to detention under this subsection.

The Supreme Court and several courts of appeals have stated that the Executive Branch has broad authority to detain inadmissible aliens, and have either declined to review or have reviewed such detention on very narrow grounds. The detention powers specified in the bill are, thus, consistent with the Executive Branch's view of its authority under existing law, and with much of the case law on point. Nevertheless, the ambiguity of the existing statutory framework has, for example, led some courts to intercede themselves into the merits of the detention of those Cuban criminals and misfits who arrived during the 1980 boatlift, despite the fact that the vast majority of the Cubans who arrived were released.

The provisions of the bill would clarify the very limited role to be performed by the judiciary in this regard should a new mass immigration emergency arise, and preclude the courts from ordering the release of aliens found to be unfit or potentially dangerous to society by the Attorney General. In essence, this provision recognizes that the paramount concern is the protection of the American public from the perils posed by individually dangerous aliens or by the uncontrolled release of large numbers of aliens. While the detention of large numbers of aliens for prolonged periods is permitted by this bill and current case law, humanitarian and practical considerations will always dictate the use of common sense in assessing any particular detention situation. The language of this bill is merely intended, in no uncertain terms, to preclude the judiciary from second guessing the Executive Branch's decisions, made in the context of an emergency, as to which aliens should be released and when those releases should occur.

Finally, Section 240B assures that the full resources and expertise of the federal government would be available by permitting the President to designate which agencies are to be responsible for carrying out the emergency provisions invoked, and by allowing him to direct components of the Department of Defense to provide

assistance. By specifically permitting the Army, Navy and Air Force to enforce its provisions at the President's request, the bill avoids potential Posse Comitatus Act difficulties.

Section 240C makes it unlawful to violate any travel or transportation restrictions the President may invoke under Section 240B, and it contains the licensing provisions discussed earlier.

Section 240D of the proposed bill provides for both civil and criminal penalties for such violations. A civil fine of up to $10,000 may be imposed for violation of the travel or transportation restrictions, and any vessel, vehicle or aircraft used to violate such restrictions may be forfeited. A person who knowingly engages in conduct prohibited with respect to travel or transportation restrictions is guilty of a criminal offense and subject to a fine of up to $50,000 and imprisonment for up to five years.

The last major provision of the bill, which is contained in Section 240F, is of great importance. This Section authorizes a contingency fund of $35,000,000 which could be used by the President to cover the costs of carrying out measures deemed necessary to deal with the crisis under other provisions of the bill. Our Mariel experience demonstrated that the existence of such a fund is critical. It will enable the federal government to respond quickly and carry out necessary tasks which have not been otherwise budgeted for.

The reasons why large numbers of people desire to emigrate to the United States are apparent and easy to understand. Poverty, lack of opportunity and political instability are widespread throughout the world. The attractiveness of the United States to immigrants proves the success of our experiment in freedom. We have learned, however, that immigration must be a controlled and orderly legal process if the interests of those already here, and those abroad waiting for their chance to come, are to be protected. The pending Simpson-Mazzoli Bill would represent

a great step forward in controlling the usual illegal migration experienced by this country and in dealing with the legacy of past illegal migrations.

We must not forget, however, that illegal immigration can also take the extraordinary form of sudden mass movements of people to and across our border. Mariel proved not only that such emergencies can occur, but also that they can be particularly disruptive unless decisive action is taken in response. We can never again be so unprepared that a foreign government, wanting to rid itself of excess population, can send us its criminals and misfits while we simply stand by. The enactment of the proposed Immigration Emergency Bill would give the President the powers and flexibility needed to prevent and deal with any future mass immigration emergency. Even if the need to invoke its provisions never arises, the enactment of such a law would do much to demonstrate our resolve and discourage a repeat of history. We urge this Committee to give this bill its immediate attention.

Thank you. I will be pleased to answer any questions you may have.

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Senator SIMPSON. Thank you very much, Commissioner Nelson.

This legislation indeed envisions a response against a sudden mass movement of people across our borders. That is the thrust of it, is it not?

Mr. NELSON. Yes, it is.

Senator SIMPSON. Would it not be more appropriate or should it not be stated that that is the essence of the response, rather than using the term "a substantial number of aliens?" I would appreciate your view on that.

Mr. NELSON. Well, that is certainly a very good question. As we have seen, Mr. Chairman, in the long hearings and discussion and markup of the immigration legislation, we can all use a lot of help in getting the best words to meet the circumstances.

We used the word "substantial" intentionally, as I mentioned earlier. It is difficult to be too exact, and we need flexibility. We think this language does that. Certainly, we would not be against other suggested language, and we would repeat that there certainly is no intention in this legislation to cover the ongoing thing.

Clearly, we have "substantial numbers," but that has to be somewhat flexible, and also, clearly, the mass and sudden influx. We do feel that the language does meet that need. Certainly, we would not be opposed if we could come up with some better language.

Senator SIMPSON. Under the language of the proposed act in this draft, dated September 24, and the section-by-section analysis, would it be possible for the President to declare an emergency today?

Mr. NELSON. I might ask Ms. Szybala to answer that question, Mr. Chairman.

Ms. SZYBALA. We think not. As Commissioner Nelson said, that is certainly not the act's intent. The legislative history that we are now creating that exists in the form of a section-by-section analysis would make it clear that the bill is to apply only in an unusual, extraordinary circumstance.

But, again, if we would like to make that clear in the bill itself, we really are not wedded to the language.

Senator SIMPSON. We want to be careful about that, not that a President would do that, but that the law might give that power on a continuing basis, looking at the fact, I guess, that the triggering phrases are that: one, a substantial number of aliens without documents embarking to the United States; two, that the normal procedures of the INS are inadequate to respond; and three, danger to the welfare of a community within the United States.

Another question: When the statute says in section 240(a)(1) "The President may declare an immigration emergency with respect to any designated foreign country if the President, in his judgment, determines that," or "when a substantial number of aliens who lack documents authorizing entry into the United States appear to be ready to embark or have already embarked for the United States," is the word "embark," which means "to leave in a vessel," intended to exclude ground transportation? Is that intended?

Mr. HILLER. Mr. Chairman it is not. Whatever the maritime etymology of that word, it was meant in its more common usage—to begin to depart in destination for another country. Although, surely, there are circumstances imaginable—indeed, we have seen

them—when the transport would be afforded by boats, it is also conceivable that it could be a migration occurring over the land borders.

Senator SIMPSON. We will get Webster's and Funk & Wagnall's and we will pursue the best way to state that. But the intent is not a limitation?

Mr. HILLER. That is correct.

Senator SIMPSON. If those powers were in place at the time of the Cuban Mariel incident, what would have been different? What would have occurred differently under this procedure than did occur?

Mr. NELSON. We think, Mr. Chairman, that it could have been a great deal different and that the negative results would not have occurred. I realize that maybe now with the NFL strike, it is not the time to do Monday morning quarterbacking, and there is a question whether that is the case in looking back. But we all learn lessons from history.

Certainly, one of the key areas in this kind of legislation is for the President and the Congress to clearly express the intent of the United States that we will not allow this type of mass influx, and we think that gives our own people a clear signal. I think it also gives clear signals abroad. It can cure some of the hesitation problem that we all recognize occurred during the Mariel boatlift.

So, just the intention and the thrust of such legislation and the administrative action of getting ready for it, I think itself will make a great deal of difference. Beyond that, in the specifics, we do feel that the specific provisions of the Act wherein you can stop the outflow of vessels, such as occurred in Mariel—and certainly the powers are here to do that—give that kind of flexibility, where the President could have declared an emergency had we had such legislation, and actually stopped all those vessels from leaving Florida to head for Cuba. Under the circumstances of Mariel, they were powerless to really do anything until they came back in. So, we think there are provisions there.

Again, another aspect which I mentioned in the testimony earlier is having a contingency fund, I think, gives some assurance also that local and State governments will assist and not sit back and wonder who is going to do it and who is going to pay.

Senator SIMPSON. As we read the bill, the restriction in the movement of citizens or aliens in the United States is solely in relation to vehicular traffic to prevent assistance to aliens arriving on our shores. Is that a correct interpretation?

Mr. NELSON. Mr. Hiller, would you respond to that?

Mr. HILLER. Yes; basically, the restrictions and limitations drawn in the bill are more to the movement of vessels and vehicles which are subject to the jurisdiction of this Government. The burden, if any, on travel outside of the country would be just incidental to the limitation on the movement of vessels.

The purpose of the statute was to draw its limitations on movement of vessels and people in as limited a way as we could. As a consequence, American citizens, lawful aliens, or anyone else living here would continue free to travel by other means than those vessels subject to U.S. jurisdiction. For example, they could travel by foreign common carrier or foreign private vessel. The law was tai-

lored to deny the means to people whose vessels would lend themselves to that kind of migration.

Senator SIMPSON. Could you advise the subcommittee of the details of the interdiction effort and the number of boats that have been stopped, the persons questioned, the number of persons returned, and the number of persons permitted to land? Can you bring us up to date on the record with that, please?

Mr. NELSON. Yes, Mr. Chairman. First of all, our agreement with the Coast Guard technically ends today, but we have agreed within the administration that that will continue. The formal continuation documents are in the process between the Attorney General and the Secretary of Transportation. We think it has been an excellent cooperative venture between the Coast Guard and INS. We also think that it certainly has been very successful in all respects.

As to numbers, there have been five vessels interdicted. And, 186 persons who were on board were returned to Haiti after appropriate INS interviews and a determination that there were no asylum claimants on those vessels.

In addition, 111 other vessels were screened and boarded by the Coast Guard and allowed to pursue their normal trade. As you also realize, there have at least been several occasions when the interdiction effort, no doubt, saved lives because the boats were in danger and, in fact, sank on a couple of occasions. So, a number of lives were saved by these efforts.

Senator SIMPSON. Do you think that has been an effective policy? What number of illegal aliens do you estimate are now coming from the Caribbean and Central America, and how would that compare with previous years?

Mr. NELSON. Mr. Chairman, it is always easy for people in administrations to make statements of how great things are. We think in this case, there really can be no question that the interdiction efforts, of course, coupled with detention policy and other legal task force operations, have been extremely successful.

No one is really able to dispute the numbers. In the year 1980, over 15,000 Haitians were apprehended in Florida, having arrived by these mass influxes. In the year 1981—and it was halfway through that year when these policies I mentioned were put into place—the number was cut in half, down to 8,000.

In 1982—and, of course, that is just the first 9 months—there were only 93. Comparing 9-month figures for the first 9 months of 1980, 1981, and 1982, it was over 11,000 in 1980, 7,600 in 1981, and less than 100—specifically, 93—in 1982. So, there is no question that this effort on behalf of the U.S. Government has been extremely successful in stemming the flow.

Now, we recognize that obviously some additional flow, as it always has been, comes through the Bahamas or through extra crew on freighters and things like that. That number is not readily ascertainable; we do not know that. No doubt, that has, as I say, gone on all along. But, clearly, the interdiction efforts, together with these other things, have been very successful in stemming the tide.

Senator SIMPSON. I know that there has been litigation with respect to the interdiction program and we want to know what the status is of that, just briefly.

Mr. NELSON. I would ask Ms. Szybala to respond, Mr. Chairman.

Senator SIMPSON. Please.

Ms. SZYBALA. We had one suit early on in the interdiction effort, and the suit did not get very far. The court, early in the litigation on its own motion, dismissed the action—it was a Federal court action—on two grounds. First, the plaintiffs had no standing to question this kind of activity on the part of the Government. Second, even if there were some kind of standing, it was a political question in which the court would not interject itself.

Senator SIMPSON. And the status, please, of the Cuban litigation with respect to detention? I think we had tenth circuit and fourth circuit activity on limiting the right of detention. Are those cases being appealed?

Ms. SZYBALA. There are currently no appeals. We have one active case in Atlanta, Ga., which is actually now quietly dying down. Those two circuit court opinions—the first one that you mentioned, the tenth circuit opinion, was adverse to the Government. The court had language in the opinion that could be read to limit the Attorney General's detention authority. But the case was based on a very narrow, unusual set of factual circumstances, and the Government did not appeal it.

The fourth circuit opinion, on the other hand, was a victory for the Government, in which the fourth circuit very clearly held that the Government does have—the Attorney General specifically—authority to detain indefinitely, if his reasons for doing so are reasonable. In that fourth circuit case, the court distinguished the tenth circuit case on precisely the same grounds that led us to not appeal it.

We currently have no appeals, although we do have a district court case in Atlanta.

Senator SIMPSON. What is the status of the Haitian asylee applicants? How many do we have still in detention? Have those that have been released showed up for hearings?

Mr. NELSON. We think that program has gone very well, Your Honor. Again, I think that——

Senator SIMPSON. Your Honor? That is the first time you have ever said that. [Laughter.]

I will take judicial notice of that, however. It was marvelous, marvelous. [Laughter.]

Mr. NELSON. Well, it has gone very well. In fact, in many ways, I think, I will stand by that statement because, certainly, in the processing out, there are only approximately 100 remaining of the initial roughly 1,800. About 1,447 have been processed out on parole under Judge Spellman's ruling, and another 222 under the administration's humanitarian parole, which has, of course, been an ongoing procedure.

In the New York case, as you know, the Attorney General has determined under his parole plan to apply somewhat similar approaches and we expect that most of those will be paroled.

But it has gone well; it has diffused the issues. We are proceeding, of course. Here is the danger, which I know I have alluded to you and I know you are concerned with, that everybody—the Haitians themselves, the general public, and the voluntary agencies—recognizes that they are out on a temporary parole, pending legal

determination of their right to be here. That is going to be the determination.

They have a right to stay. Should they be granted asylum or have other rights? Otherwise, they will be excluded. We certainly intend very fully to continue to pursue that in all these cases.

Now, on the question as to how many have showed up, there have been a limited number of hearings, so we have not really had much in the way of statistics there. In the reporting requirement, there were about 73—and, of course, that is not a large number compared to the total number—that have failed to report. Yet, with about half of those, there has been contact reestablished. So, we are talking about 37 where we are further investigating as to why they have not reported, and we have lost leads on about 9.

So, actually, the number is not great, but the key test will be, as the hearings proceed, to be sure they, in fact, get lawyers or come to hearings and that they appear for those hearings.

Senator SIMPSON. Are you getting more cooperation out of the voluntary agencies who are involved in assisting in assuring that they appear for the hearings?

Mr. NELSON. Yes; I think overall our relationship with the voluntary agencies, while we had some initial differences on funding and procedures, has worked out well, and I think we can compliment them. Now, there have been a few glitches in their proceedings, but overall I think their efforts have been good, not that they are not cases where they can be improved. But considering the program and the processing speed here, I think overall we can be pleased, including the voluntary agencies' efforts.

Senator SIMPSON. I believe that my good colleague from Iowa, Senator Grassley, may have some questions. I certainly always have appreciated his dogged persistence in immigration and refugee matters; it matches every bit mine and I appreciate it very much.

Senator GRASSLEY. Thank you, Mr. Chairman.

What I am going to address to you is something you have heard me visit with you about before, as well as other members of the committee. It was a point of discussion on the bill when it was on the floor, and it was also the point of a major divergence of views between Senator Kennedy and myself.

Because of the tight budget situation in the INS and also the lack of manpower, I proposed an amendment to the immigration bill allowing for more cooperation between local policemen and INS personnel in domestic immigration law enforcement.

You are well aware of the Griffin Bell directive. This chilled the cooperative effort previously enjoyed by the INS and local police. During discussions between myself and the Department of Justice, I was assured that this directive was undergoing a review with an eye toward increasing cooperation.

Given the continued confused state of refugee processing in Indochina, even more resources may be necessary. This is something that we have just been made aware of since the initial discussion of this. This may cause a further drain on the resources of the INS for local enforcement.

Can you give me the current status of the revision of the Bell directive, and what specifically is being done to increase coopera-

tion between local law enforcement and the INS? I feel that this is a proper time to discuss this question because we are talking in the context of unusual situations and whether or not this cooperation is addressed in this new legislation.

Mr. NELSON. Senator Grassley, I appreciate the question and the dialog that we have had on this issue before, and I am pleased to respond to that. As we indicated to you, it was certainly the belief of the INS—and I can share that with the Justice Department, also—that the Griffin Bell directive was not really appropriate and it should be changed.

While the language of it might not have been as bad as some thought, I think the intent or the way it was used was as a bar to effective coordination. You had that concern and we did. We have, within INS, analyzed that issue and discussed with Associate Attorney General Rudy Juliani. We are in the process of proposing that that Griffin Bell directive be withdrawn, and that is in the mill now. It has not reached up all the way to the Attorney General, but I have no reason to believe that there will be any problem with doing that. So, I would fully expect that we will, in fact, achieve that result.

Beyond that, of course, as we have discussed too, we are fully committed to effective coordination with law enforcement. I think throughout the Department of Justice, there has been a great effort since Attorney General Smith has been in office to get better coordination. We have established law enforcement coordinating committees throughout the country and INS is an active participant in those.

We ourselves are working closely with a number of the U.S. attorneys. We have set up several special assistant U.S. attorney positions where INS lawyers will work directly with the U.S. attorneys offices. We have set up and have utilized in Miami on the Haitian issues and others a special litigation task force, and I think that has been effective. We also have several of those going in other areas.

We will be having within the next few weeks a 2, 3-day offsite between many of the top U.S. attorney people and top INS people, including myself, to coordinate. I have spoken and met with a number of the police officer associations and others. We have had a lot of local coordination.

So, it is a matter of building on the ongoing relationship, which we are committed to do, and effectively coordinating, which likewise we are committed to do. I think we will achieve your concern on the Griffin Bell directive.

Senator GRASSLEY. Do you have any particular timetable or could you make any guesstimate of when the rescission might be effective or when the decision might be made, as opposed to when it might be effective?

Mr. NELSON. I would hate to give you a very specific timetable, but I would think there is no reason—as I say, we have discussed it at the associate attorney general level and I do not expect a problem, so I would hope within 1 month. It is really a matter of just processing the paperwork.

Senator GRASSLEY. Well, that is very good news. Thank you very much.

Mr. Chairman, that is the only question I had, and I am going to have to apologize. I am not going to be able to stay around anymore for this meeting.

Senator SIMPSON. Thank you for coming. I appreciate it.

Senator Kennedy is very much desirous of being here. He is on a floor activity now. I believe that Associate Deputy Attorney General Hiller has an aircraft to catch, is that correct?

Mr. HILLER. Yes, sir.

Senator SIMPSON. Why do you not do that, then?

Mr. HILLER. Thanks very much.

Senator SIMPSON. We will get back to you at some future time, undoubtedly.

Thomas Enders, our Assistant Secretary for Inter-American Affairs, will be here at approximately 3 o'clock, and we will go forward. I have just a couple of more questions and then we will just have a recess, since we have a bit of time. We will not go to the recess that is on the agenda. We will just go forward, except if Secretary Enders is not present, we will recess until he comes.

Could the President, under existing authority, handle any emergency influx? Does this bill not really focus on actions after the aliens are here rather than initial entry, when we talk about detentions and exceptions from the environmental laws in reference to detention? Your thoughts on that, please.

Mr. NELSON. I will ask Ms. Szybala to comment.

Senator SIMPSON. Yes.

Ms. SZYBALA. There is no doubt that there are authorities under current law which could be used to, we think, effectively deal with any sudden influx. A large part of being effective in response to an emergency is a resolve, and I think the Government now fully has that resolve that it would need to use what is available.

But there is no doubt that there is need for change in the laws. None of the current authorities that could be used relate specifically to an immigration emergency, and most all of them are untried in that situation—untested. That does create a certain amount of doubt. That doubt will undoubtedly cause some hesitation, and that kind of hesitation is fatal.

We think we have the resolve to use current authorities. We would like to be able to use authorities that are tailored to meet the situation. That allows us to act in a way that is not overly broad. One of the difficulties with current authority being not tailored to an immigration emergency is that it allows more emergency powers than we would need in an immigration emergency.

The second part of the question asked, I believe, whether the bill focuses on what would happen after the aliens are here. We do not see the bill that way. A large majority of its provisions relate to stopping an influx before it occurs and stopping southbound vessels leaving the United States to pick up aliens.

The provisions that are intended to help us deal with the effects of any mass immigration emergency are incidental, and there are only one or two of them.

Senator SIMPSON. One final question: When we get to the area of indefinite detention, that always raises flags and signals and the situation where we cannot return the alien to his or her native country. What is envisioned there? We are not talking about, of

course, a life sentence for an asylum applicant. But what is our approach to this difficult problem of this group of individuals—asylum applicants who do not qualify but cannot return?

Mr. NELSON. Of course, that is a very difficult situation, Mr. Chairman, and one we hope does not happen or is very limited. Of course, we would hope to have the situation where you can return people to their countries.

Certainly, the life sentence question—no one likes that. We have practical, humanitarian considerations, and certainly it is obvious, in general response to your question, that in the legal processes of asylum proceedings and the Immigration and Nationality Act, anybody who can qualify for asylum or other procedures for admission will go through those.

As I say, in addition, you would apply humanitarian considerations and the practical ones. Even with the Mariel Cubans, so much focus is on the criminals and on the mentally ill, people that are in long-term detention. But the number there has been greatly reduced, so we hope it is not a big problem.

Frankly, passage of legislation such as we propose here, we think, is itself one of the best answers; that there is a clear signal from the United States that we will have these powers and will use them. We can do the best we can in the future to avoid the kind of contingency that brings about the problem you address.

Senator SIMPSON. I thank you very much for your presentation, both of you. Ms. Szybala and Al Nelson, thank you for this helpful testimony.

So, we appreciate that, and thank you.

Mr. NELSON. Thank you, Mr. Chairman.

Ms. SZYBALA. Thank you.

Senator SIMPSON. The next panel before the subcommittee is Ambassador Gene Douglas, U.S. Coordinator for Refugee Affairs, and Thomas Enders, Assistant Secretary for Inter-American Affairs of the Department of State. It is a real pleasure to have you both here.

Tom, I know you made a special effort to be here, and I am very appreciative, and Gene, too. Wait a minute. Here is my colleague from Florida. Just a second.

[Pause.]

Senator SIMPSON. I have Senator Hawkins here, and I deeply appreciate that. If we could take her statement, then we will immediately come back to this panel.

How did things go on the conference on the missing children?

STATEMENT OF HON. PAULA HAWKINS, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator HAWKINS. We have a bill.

Senator SIMPSON. You have a bill?

Senator HAWKINS. We have a bill which is satisfactory to all parties, with a unanimous consent to waive the 3-day rule and vote it out tonight so that the President can sign it. I think that is a great step forward.

Senator SIMPSON. Well, I am pleased.

Senator HAWKINS. I appreciate your tolerance in my being late to all of your hearings. I am sorry.

Senator SIMPSON. That is all right. You are at least present, and that is the important thing, and we appreciate it. So, if you have a statement to make, we would be pleased to receive it.

Senator HAWKINS. I will rush through it because I know you have heard this before, Senator.

I want to thank you for the opportunity that you have allowed Senators from Florida to have input on the problems that confronted Florida and to discuss the means of dealing with immigration problems that might develop in the future.

I have already proposed to your committee one way that we can deal with problems posed by a sudden influx of aliens encouraged to emigrate by a government in outright violation of our immigration laws. My proposal was an amendment that would have required that the Federal Government bear 100 percent of the cost of any future Mariel boatlifts, and I hope that the committee will give this suggestion continued and full consideration.

But you are here today to discuss another means of protection—immigration emergency powers. I would like to make it clear at the start that my support for immigration emergency powers legislation does not mean that I oppose our national policy of accepting persecuted people. On the contrary, I fully believe that the United States should continue as a beacon of hope to those who live in fear of death or imprisonment for their political or religious views.

As you all know, Florida has been a haven, a retreat, for Cubans and other Latin Americans who have fled tyranny and persecution, and I am proud of them and proud that they are successful. Florida has given solace and refuge to these brave refugees, and they in turn have made significant contributions to the prosperity and culture of our State. I do believe in effective enforcement of our immigration laws, but I welcome those who are eligible to enter our country as political asylees.

I want to emphasize the distinction between the case of a small group fleeing persecution and a massive influx of undocumented aliens. This difference in magnitude is significant because it affects the accepting community. For instance, there is a tremendous difference between receiving a large number of Indochinese refugees over a number of years and accepting the Cuban entrants who arrived from Cuba over a number of months from Mariel.

Most important, the Indochinese refugees were interviewed before they were allowed in the country, and their legitimacy as refugees was established. Also, Americans had enough time to prepare the refugees for adjustment to American society and to prepare themselves. The alien who hops in a boat and heads for our shores is not that lucky. We may have no clear idea whether he is here legitimately or not, and even more important, we have no time to prepare for his arrival.

When you are dealing with numbers like 120,000 entrants over a span of 6 short months, tremendous problems are unavoidable. Most of you remember the segments from the evening news during the Mariel boatlift. Scores of small pleasure craft bring in hundreds of Cubans. Tent cities are constructed hastily under the shadow of the highway overpass. Thousands of Cubans are

screened in an effort to distinguish legitimate refugees from the criminals, the mentally ill, and other outcasts that Castro tried to dump on the United States, and did so very successfully.

The arrival of the Cubans 2 years ago has had an impact on south Florida that we have yet to recover from. As you know, in most cases crime increases along with the increase in population. The increase in the Dade County crime rate has far outgrown the population increase. In the year following the boatlift, Dade County's population increased by roughly 10 percent, but the increase in serious crimes rose double that—23 percent.

Prior to the boatlift, the crime rate in Dade County had actually decreased, and I cannot tell that enough. Every time I see Senator Simpson, I tell him that. I believe that this underscores the real purpose and need for the emergency powers that you are here for today.

It is to provide protection for any community from the type of disaster that befell Florida in 1980. It is to protect people and the quality of their lives from the impact of a sudden and massive influx of undocumented aliens.

There are also financial considerations at work here. Conservative estimates place the cost of the Mariel boatlift at $1 billion—$1 billion that could have been spent on veterans programs, Mr. Chairman, aid to the handicapped, education assistance, health programs, a job training program, all designed to help Americans with legitimate needs. These are the alternatives that we could have spent money on, but we spent it on a surprise influx of aliens, and clearly we have a need for immigration emergency legislation.

Unfortunately, a recurrence of the Mariel experience is entirely possible. Mariel was a contrived scenario. Manipulating the discontent seething below the surface of the Cuban population, Castro orchestrated an exodus to have the maximum detrimental effect on the United States.

The State Department has estimated conservatively that one-tenth of the Cuban population, 1 million people, have expressed an interest in leaving Cuba for the United States. This latent discontent, plus a depressed economy, are perfect conditions for a repeat of the Cuban boatlift, should Castro so desire. It would be unconscionable for the United States to be caught unprepared again.

At the very least, there must be a public contingency plan. I know that the administration has drawn up a plan, and that is good. The administration's contingency plan is classified, however. That is counterproductive. One of the main reasons to have a contingency plan at all is to assure the people of Florida or any other State that effective measures are available to them; also, to show the Cuban Government that the United States is determined to resist violations of their immigration laws.

The administration has made public a list of sections in the law to back up their contingency plan, and this list was most helpful. But, unfortunately, it only emphasizes the need for more extensive legislation. The legislative authority applies mainly to certain situations, punishing people who bring undocumented aliens into the country illegally, detaining aliens, and making certain classes of aliens illegal. There must be broader authority.

The boatlift would not have been possible had not hundreds of Americans sailed to Mariel Harbor in hopes of finding their relatives. The hope of these Americans is perfectly understandable. However, the result of their actions was a disaster. Fines or the forfeiture of vessels is not sufficient to deter their actions. There were fines in place in 1980 and vessels used in the illegal transport of aliens were subject to forfeiture. Yet, people took the risk and sailed to Mariel Harbor. Clearly, more extensive authority is required.

I support the legitimate need for full immigration privileges from Cuba to the United States and legal immigration to the United States. I support efforts to reinstate preference visas for Cubans, since there are none being granted now. If there are Cubans desiring to come to the United States, as I know there are, then legal immigration is a proper route, but orchestrated by us, not by Castro.

Immigration emergencies are a new experience for the United States and we are trying to address them with a comprehensive approach to the problem. I encourage you and your committee to move forward now and in the next Congress with legislation designed to protect our communities from the sudden and devastating impact of an immigration emergency.

I understand you have some questions, Mr. Chairman.

Senator SIMPSON. Well, I want to thank you very much for your patience and your understanding in withholding your deep feelings and your intent to legislate in this area of emergency powers and financial assistance to the impacted communities so that the Immigration Reform and Control Act of 1982 could move as it did through the Senate. I very much appreciate that. I want to publicly and sincerely acknowledge that.

I hear clearly what you are saying. We have listened to you because there is no area of the United States more dramatically impacted than Florida, and south Florida particularly.

In your sensitivity as a public official, could you share with us your review of the sentiment of the people of Florida with respect to emergency powers—a rather dramatic move in itself? What have been your findings of public opinion on that?

Senator HAWKINS. Well, all polls that have been taken in the upcoming election, for instance, that are published weekly in the newspapers show the failure of our present immigration system to be the No. 1 thought on the voters' minds this year.

I know of no poll which shows what they think the State government should do versus the Federal Government, because Floridians, like Americans everywhere, will probably disagree with this provision or that provision of the proposals before us by the President.

But one thing I know for sure is that Floridians say over and over again that they never again—we even call it the "never again" legislation, as you know; never again will this happen on our shores.

So, I say that Floridians see emergency powers as effectively preventing that happening again, and I believe they would fully support any emergency powers that you propose.

Senator SIMPSON. There is in the legislation a proposed waiver of environmental laws, which is designed, I believe, to avoid particularly the difficulties that were experienced when there was movement of asylum applicants to Fort Allen. Do you have any problems with that environmental waiver? I would be interested in your comments.

Senator HAWKINS. Well, I have worked hard on environmental legislation, as you have. In the case of an immigration emergency, I think we need to be prepared with laws that will enable us to deal with the situation before us as quickly as possible, and not be hampered by a law that may be on the books that would restrict our being able to deal with this sudden emergency.

I do not want us to be constrained by laws and regulations designed to be implemented when business is as usual. So, I think we may have to have certain provisions there. As you know, the sewers broke at the camp and many things happened at that time which were against current law that we had. But there was nothing we could do about it.

So, I do not want us to be constrained by present laws that you and I have worked hard to put on the books. I do not want them to constrain us from handling an emergency situation.

Senator SIMPSON. A final question: Do you think that the local and State government agencies in Florida are more alert to their own emergency planning in relation to any such future immigration condition?

Senator HAWKINS. In jest, I could tell you that we had a meeting and decided that we would meet them at the shore and send them to Wyoming and Kentucky in the future.

Senator SIMPSON. Well, I am going to tell Mazzoli what you said. [Laughter.]

Senator HAWKINS. But knowing that that would not meet with much understanding with your kind heart, you may be surprised to know that the State of Florida has drawn up a State emergency plan. The plan is based on the lessons State officials learned during Mariel. I understand from the officials who drew it up that it is fairly detailed and that there are efforts underway to coordinate the State and the Federal contingency plans.

Local officials were consulted when the plan was drawn up and we had their input. As I understand it from the Governor's office, the local officials put their input into the State plan.

Mr. Robert Wilkerson, who is director of the division of public safety, planning and assistance, is the official responsible, and you may wish to contact him. He was giving a speech today in another State, but he is the official responsible for drafting Florida's plan, which may be of assistance to this committee.

Senator SIMPSON. I thank you very much. Thank you very much, Paula. You are very helpful.

Senator HAWKINS. Thank you, Mr. Chairman.

Senator SIMPSON. Now, we will return to the panel of Ambassador Eugene Douglas, U.S. Coordinator for Refugee Affairs, and Thomas Enders, Assistant Secretary for Inter-American Affairs of the Department of State.

We will take your statements in that order, please.

STATEMENT OF A PANEL CONSISTING OF H. EUGENE DOUGLAS, U.S. COORDINATOR FOR REFUGEE AFFAIRS, AND THOMAS ENDERS, ASSISTANT SECRETARY FOR INTER-AMERICAN AFFAIRS, DEPARTMENT OF STATE

Mr. DOUGLAS. Thank you very much, Mr. Chairman. I am pleased to be back today.

I appreciate very much the opportunity to appear before the committee in my role as the Coordinator for Refugee Affairs in behalf of the administration's proposed Immigration Emergency Act.

The significance of this legislation certainly extends well beyond the obvious arena of immigration and border controls. Our success in fashioning an effective, new authority in this vital area can help restore the confidence of the American people in the Federal Government, and contribute to that new consensus that we have often spoken of that we must regain control of our borders. The existence of our national refugee policies, for which I am principally responsible, depends upon this same national consensus.

The mismanagement of immigration emergencies, such as we experienced in the Mariel boatlift, has the capacity to violently upset the delicate balance of that consensus, and thereby poison the goodwill of Americans toward immigrants and refugees alike.

As many of you know, we have resettled an unprecedented number of refugees in the United States since 1975. While the refugee program has its problems, most Americans have been willing to bear with them and support the refugee program out of our long traditions of welcoming the politically oppressed.

The sudden influx of Cuban entrants into the United States in 1980, which included large numbers of criminals and other socially maladjusted people, seriously jeopardized the public's goodwill. This influx also put exceptionally heavy financial and social strains on some communities and left us with a residual population which must be permanently incarcerated in order to protect our people.

This entire experience left the American public with a feeling that their Federal Government had broken faith with them by failing to protect the normal channels of immigration from cynical exploitation of foreign power. That is the kind of experience which we know destroys national consensus and which, to this day, has left a lingering doubt in the public's mind over whether such a crisis will occur again with such devastating effect.

In this atmosphere, the American people can hardly be blamed for wanting new assurances that the Government can manage all three areas of entry into the country—immigration, refugee entrants, and illegal aliens—nor can we easily blame the public for balking at attempts to widen the scope of any of these three areas.

This administration is attempting to repair the people's loss of faith in Washington's management of our borders through a three-part program: One, the support of the Simpson-Mazzoli immigration bill now before the House, having already passed in the Senate; two, a careful attention to the consultation process available through the Refugee Act of 1980 to more closely match refugee admissions with domestic resources available to receive and reset-

tle new arrivals; and, three, the Immigration Emergency Act to cover the unanticipated major crises of mass migration.

Another aspect of the Emergency Immigration Act which is most important is its mandate to consult with State and local governments in formulating emergency plans. One cannot reasonably expect the people to obey laws and cooperate in activities that they do not understand.

Since becoming the Coordinator for Refugee Affairs in March of this year, I have spent a great deal of time talking with State and local government officials who are understandably most concerned that we consult with them concerning refugee admissions into this country.

The States most heavily affected by the influx of refugees resettled here since 1975 are, in some cases, also States with high populations of illegal immigrants. There needs to be a coordinated policy established to insure that both immigration and refugee contingencies are met with plans that include the full knowledge of and consultation with State and local officials.

In conclusion, I would like to say that the migration as well as the refugee situation in the world today continues to grow as the number of countries affording their citizens basic human rights and economic opportunities continues to decline. More than ever before, there will be increased pressures on the United States to take not only the victims of the political upheaval, but those who are the victims of the failed economic policies in which these regimes often result.

While Americans have traditionally had a generous refugee and immigration policy, we have also had an orderly one, rooted in due process with priorities established by the American people.

The opportunity to resettle in the United States is not a right, but a gift, and that gift is rooted in the memory that most Americans at one time or another and their families were all immigrants into this country.

It is to our great credit that we continue that tradition. It is also our responsibility in government to protect that tradition with laws that prevent its abuse, exploitation and manipulation. For that reason, I urge this committee to support this legislation and seek its quick implementation so that the Immigration Emergency Act can take its place as the third leg of our national policy to effectively manage immigration, illegal aliens, and refugees.

Thank you, Mr. Chairman.

Senator SIMPSON. Thank you very much.

Secretary Enders.

STATEMENT OF THOMAS ENDERS

Mr. ENDERS. Mr. Chairman, thanks very much for asking me to join this hearing. I have not had a chance to prepare a statement, but could I make some observations in support of the act?

Senator SIMPSON. Indeed, that would be just as appropriate.

Mr. ENDERS. The position of this country has always been that it would welcome, to the extent it could, those fleeing from oppression and fleeing dictatorships, and I hope it always will be the tradition of this country. Quite clearly, that does not mean that per-

sons can come here when they want and how they want without submitting to our laws and our procedures. And above all, it does not mean that people can come here when they are sent here in masses by a government determined to solve its domestic, political, and economic problems by manipulating a mass exodus to the United States.

That, of course, was what happened in 1980. As far as we can tell, this was not planned far in advance. A domestic political situation characterized by increasing protests, bad economic results, and challenges to the Government was improvised by the leadership of Cuba into a mass exodus to the United States.

One of the first things this administration did when it came into office was to prepare a contingency plan to prevent another Mariel. I would like to state very firmly that it is the intention of the administration to apply that plan. We have, we believe, the means to stop in very short order an effort to repeat what happened in 1980. The critical factor, of course, is the departure of United States own boats southward. We would act to prevent that, should circumstances of the Mariel type arise in the future.

Now, that is an administration policy and it is an administration undertaking. But we should make it a fully national policy and a fully national undertaking by legislating it and making it a permanent part of our authority.

I think the Commissioner of Immigration and Naturalization has already given you an outline of what the proposed legislation would do to confirm and reinforce the authorities we now have and we are prepared to use.

Let me say that we do not have information at the present time which would lead us to believe that the Cuban Government is preparing another Mariel. But it is true that there exist conditions now in Cuba which are not unlike conditions which led to the two previous waves of immigration in 1965 and in 1980.

The economic situation is bad. Cuba is unable to pay its debts. World sugar prices are very low, and the cumulative bad performance of the Cuban economy means that the Cuban people cannot expect any increase in their living standards perhaps for the rest of the century, and have been so told by their leadership.

Significantly, perhaps, Castro has in the recent past made references to what he called "lumpen," or scum, a word he had used before—people undesirable still in the Cuban population. Cuba has indeed identified what it considers to be an exportable group that lives on the margin of the society, which may be as large as 200,000 people.

Looking at all indicators, we think that it is possible that as many as 2 million people in Cuba might wish, under certain circumstances, to leave. I repeat, we have no information which leads us to believe that another Mariel is imminent, but it is clearly a matter of urgent necessity to keep watching very carefully all intelligence indicators which might lead to a conclusion.

Now, there have been suggestions that the way to deal with an issue of this kind is not by emergency legislation, but by negotiation. We have had some experience with negotiations on this subject. Indeed, in 1977, we approached the Cuban Government and said that we wished to create circumstances in which the legacy of

the past could be undone—the tensions that existed between the two countries, the embargo, the exceptional circumstances of our relationship.

We suggested some actions on Cuba's part to build confidence, and proposed some on our own. It is noteworthy, however, that when we asked Cuba whether it could begin to pull down the number of troops it had in Angola, it instead went into Ethiopia. And when we asked whether we could have some assurances on its behavior in the hemisphere, after 10 years of not exporting revolution it launched into the current campaign in Central America. And while these negotiations were going on, Mariel occurred.

A short time ago, Secretary Shultz, asked about negotiations, said that what we expect from Cuba is action not proposals for negotiation. If, in fact, they change their policies, many things are possible.

Well, one thing they could change at the moment is to take back those persons that are excludable under American law that came over at the time of the Mariel boatlift. They have no right to be here. They have no basis on which to be here, and it would be, it would seem to me, a start of an approach to this problem for Cuba now to make the gesture to take back those people, many of whom must now be confined in institutions and can never really, in our judgment, be let go in an open and free society like this one.

Thank you, Mr. Chairman.

Senator SIMPSON. I thank you. It is helpful to have that information. I have always felt that negotiations should be pursued, and I will not probe that, hoping that they are going on and ongoing. And I am sure they are sensitive because I am sure they cover a broad range of issues.

Let me ask you both, whoever wishes to address the question, you have already stated that you feel that another mass first asylum situation is not brewing there and forming.

Mr. ENDERS. Not being planned.

Senator SIMPSON. Not what?

Mr. DOUGLAS. Not being planned.

Senator SIMPSON. Not being planned, yes. Do you share that view?

Mr. DOUGLAS. Yes, Mr. Chairman, I do.

Senator SIMPSON. "Not being planned." That is your phrase?

Mr. ENDERS. The last two occurred spontaneously as a result of internal troubles in Cuba. The Cuban Government, in effect, arranged to direct the people toward the United States and away from the Government itself, and that could happen again.

Senator SIMPSON. Could you identify the most likely areas of that, if it should occur? You indicated that the economy in certain areas would be material in that. Is there anything further you can share on that?

Mr. ENDERS. Well, we really do not know how Cuban society is going to develop over the next several years. There are what must be to the Cuban leadership some worrisome signs. The kids do not seem to have the same affection for war and revolution that the leadership does, nor do they appear to be terribly anxious to be recruited into the army and sent to Africa. So, recruitment for Africa goes by stealth, in effect. In the regular army, you do not know

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until you are about to go to Africa that you are going there, and then you find yourself there maybe for some time.

But, of course, the stories come back from Africa about the casualties and the diseases there. That is one set of factors.

I cannot overemphasize the long-term damaging impact of the lack of expectations in the economic field. This is a country which is more dependent now on sugar than it was 20 years ago at the time of the revolution. It is a country which can only maintain a constant per capita income on the basis of receiving subsidies from the Soviet Union equivalent to a quarter of its gross national product. But it is, at the same time, a country highly committed to foreign adventures.

I am not suggesting that Castro has overall, in the immediate term, a control problem. But there is really a quite evident lessening of the enthusiasm on the part of the population for his leadership. And we have seen in the past that that can change quite quickly into challenges to the Government.

Senator SIMPSON. Do you see a likelihood of a mass, first asylum situation in other countries?

Mr. ENDERS. Well, we have cast the legislation in such a way so that it could be used in case such situations occurred elsewhere. Indeed, it has become apparent that a sudden burst of people can appear from almost anywhere in the area. We saw one occur—not as a result of a government action but as a result of a social movement—from Haiti.

We saw, after the fall of Somoza in Nicaragua, that a very large number of Nicaraguans suddenly tried to come to this country. So, clearly, there are other events that could occur, and we are not predicting any one of those in the immediate future, but we are aware that it could happen.

Senator SIMPSON. How have other countries, both developed and lesser developed countries, viewed our interdiction precedence? How do you evaluate the foreign policy impact of the interdiction effort?

Mr. DOUGLAS. I will start out because of the work that we do with the U.N. High Commission in moving around Europe and Asia. I would say that in its first days and in its first months, the response was, on the whole, unfavorable. They were not understanding what was going on in the territory.

As time has progressed, UNHCR has come into the area at our invitation and on their own volition on some occasions. They have come into Haiti and out to the straits area. They have reversed that. We have, at the moment, little to no criticism, as the understanding of the immigration and the costs to the American people of illegal immigration and this Mariel episode has been internalized.

Senator SIMPSON. Two more questions, one for you, Tom, and one for you, Gene.

Tom, in your view, what would be the reaction of the Mexican Government to the enactment of this emergency powers legislation?

Mr. ENDERS. Well, first of all, there is no reason to believe that the Mexican Government would consider it to be legislation which is directed at Mexico. And there is nothing in the legislative histo-

ry or the preparation of it that would suggest that it is. We, frankly, have been thinking of other circumstances.

The problem of undocumented aliens, of course, is addressed in the immigration bill that has passed the Senate. I would add something to that, though. On migration, we have had over the last 18 months some very intensive discussions with the Mexican Government to inform them of our own thinking, of the direction in which we were going, and of proposals before they were brought up here. We have of course made sure that the Mexicans were up to date on developments within the Congress.

The Mexican Government has not so far made recommendations or given us advice on our legislation or proposals. I would think this, in effect, reflects a situation in which the Mexican Government quite clearly understands that the United States must exercise the right of sovereignty within its own territory, just as Mexico does within its territory.

I would not rule out that the Mexican officials would not make suggestions to us in the future, but I think that they have not so far.

Senator SIMPSON. Ambassador Douglas, in this sensitive area, as U.S. Coordinator for Refugee Affairs and in your recent dealings with nations of the world, how will you explain the emergency powers legislation—you have indicated that somewhat—to especially a reluctant country of first asylum like Thailand, where they too would view the Indochinese refugees as perhaps illegal immigrants, and certainly indicate that they are facing an immigration emergency which might warrant extraordinary measures? How will you handle that?

Mr. DOUGLAS. With great care.

Senator SIMPSON. Yes.

Mr. DOUGLAS. I think we have already on a couple of occasions, Senator, talked to the Thai about this general direction. They are very perceptive on the implications of Mariel and the Cuban interdiction. On the last trip I had out there in June, at least three of the senior people in the Government raised philosophical and legal questions not in challenge but in almost sympathetic questioning on how a number of countries—United States, Thailand, Austria—are going to deal with rising threats to their ability to control not only their borders but their own social fabric.

It is one thing to talk about repelling or being resistant to first asylum and to adopt an inhumane or uncaring posture, and it is another to talk about protecting an orderly flow as part of an open, caring immigration and refugee policy.

I think it would not be difficult to explain to our friends and allies abroad.

Senator SIMPSON. I thank you both very much for coming, and I appreciate the special effort, I know, that you made, Tom, to do this. Thank you. Thank you, Gene.

Now, the next panel—and we will have a 5-minute break—is Prof. Mark Miller, University of Delaware at Newark; and Prof. Harold Maier of the Vanderbilt University School of Law in Nashville.

We will take a 5-minute break.

[Whereupon, the subcommittee stood in recess from 3:31 p.m. to 3:41 p.m.]

Senator SIMPSON. We will go forward with the hearing with Prof. Mark Miller and Prof. Harold Maier, and I think in that order, please. I regret that we do have a time limitation and the light will go on.

Are you ready, Mr. Day, to turn on the light? Is that not impressive? God, it is magnificent.

STATEMENT OF A PANEL CONSISTING OF MARK J. MILLER, UNIVERSITY OF DELAWARE, NEWARK, DEL., AND HAROLD MAIER, PROFESSOR OF LAW, AND DIRECTOR, TRANSNATIONAL LEGAL STUDIES, VANDERBILT UNIVERSITY LAW SCHOOL, NASHVILLE, TENN.

Professor MILLER. Mr. Chairman, many of the concerns which led to the drafting of the Immigration Emergency Act are shared by other democratic societies. The global migration crisis has propelled immigration and refugee issues to a prominent place on the public agenda in most Western European countries.

In Western Europe, as in the United States, a broad consensus has emerged on the need to take prompt and effective steps to restore or enhance governmental control over immigration. While no Western European country has experienced an immigration emergency of the same magnitude as the 1980 Mariel boatlift, there have been comparable episodes in recent Western European history.

When the number of asylum seekers in the Federal Republic of Germany skyrocketed to over 100,000 in 1980, for example, extraordinary steps were taken by German authorities to revise regulations concerning asylum seekers. More recently, in France, an influx of illegal aliens and undocumented aliens occurred as news of the French amnesty program for illegal aliens spread abroad. This prompted the French Government to bolster its border controls and to adopt new regulations requiring aliens to provide proof of their intent to return home.

The expected involvement of aliens in recent terrorist incidents in Paris has given a new sense of urgency to regulation of alien entry and residency. In the wake of the rue des Rosiers incident, for example, there were demands for urgent revision of France's liberal refugee law. Both the Germans and the French have seen their national security and sovereignty endangered by uncontrollable events involving aliens, as did the United States during the Mariel outpush.

Due to the saliency of immigration and refugee issues, European authorities sought to strengthen and clarify the legal basis for governmental action on immigration and refugee matters. Such efforts to strengthen and clarify governmental powers to meet new challenges and contingencies, however, do not include specific reference to immigration emergencies, nor do they require a formal declaration by heads of state to become effective.

European governments generally can be said to possess broad powers to prevent a threatened mass migration of visaless aliens,

but have not felt the need to adopt specific laws for immigration emergencies.

The French President, for example, does possess broad emergency powers under article 16 of the 1958 constitution which perhaps could be invoked during an immigration emergency. The German Chancellor, likewise, has broad emergency powers which conceivably could be invoked during an immigration emergency of large magnitude.

France and Germany are both members of the European Community, and their laws must be consistent with Community law. It is difficult to imagine how restraints on an individual's right to leave his or her country could be reconciled with the freedom of movement provisions of the Treaty of Rome and other international treaties signed by France and West Germany.

Other restrictions foreseen under the Emergency Immigration Act seem consistent with European laws prohibiting the transportation and harboring of illegal aliens. Vehicles, for example, which transport illegal aliens can be impounded. The West Germans levy a fine on air carriers who bring in illegal aliens. Special visas and other forms of travel restrictions on classes of aliens suspected as potential law abusers have been imposed.

Perhaps the French and Germans have not felt it necessary to pass immigration emergency legislation because they regard the immigration situation as an ongoing crisis which can only be dealt with by far-reaching, comprehensive immigration policy reform.

Thank you.

[The prepared statement of Mark J. Miller follows:]

PREPARED STATEMENT OF MARK J. MILLER

Many of the concerns which led to the drafting of the Immigration Emergency Act are shared by other democratic societies. The global migration crisis has propelled immigration and refugee issues to a prominent place on the public agenda in most Western European countries. In Western Europe, as in the United States, a broad consensus has emerged on the need to take prompt and effective steps to restore or enhance governmental control over immigration.

The first steps toward reform of Western European immigration policies began in the 1960's and eventuated in decisions to stop guestworker recruitment in the 1973-1975 period. Since then, Western European reforms have centered on employer sanctions and revision of laws regulating the admission of refugees, guestworker dependents, tourists and, to a lesser extent, foreign students. Faced with ever growing guestworker populations (due to births and a steady influx of dependents), mounting unemployment and serious integration problems, European governments are now more determined than ever to prevent abuse of their immigration and refugee laws.

While no Western European country has experienced an immigration emergency of the same magnitude as the 1980 Mariel boatlift, there have been comparable episodes in recent Western European history. When the number of asylum seekers in the Federal Republic of Germany skyrocketed to over 100,000 in 1980, extraordinary steps were taken by German authorities to revise regulations concerning asylum seekers. More recently, in France, an influx of illegal aliens occurred as news of the French amnesty program for illegal aliens spread abroad.[1] This prompted the French government to bolster its border controls and to adopt new regulations requiring aliens to provide proof of their intent to return home. The suspected involvement

of aliens in recent terrorist incidents in Paris has given a new sense of urgency to regulation of alien entry and residency.[2] In the wake of the rue des Rosiers incident, there were demands for urgent revision of France's liberal refugee law. Both the Germans and the French have seen their national security and sovereignty endangered by uncontrollable events involving aliens as did the United States during the Mariel outpush.

Due to the saliency of immigration and refugee issues, European authorities have sought to strengthen and clarify the legal basis for governmental action on immigration and refugee matters. Such efforts to strengthen and clarify governmental powers to meet new challenges and contingencies, however, do not include specific reference to immigration emergencies. Nor do they require a formal declaration by a head of state to become effective. European governments generally can be said to possess broad powers to prevent a threatened mass migration of visaless aliens but have not felt the need to adopt specific laws for immigration emergencies.

TABLE I

Number of Registered Asylum Seekers in the FRG and Number of Persons Recognized as Asylees 1970-1980

Year	Asylum Seekers	Persons Recognized
1970	8,645	3,488
1971	5,388	5,530
1972	5,289	2,464
1973	5,595	1,862
1974	9,424	3,961
1975	9,627	2,764
1976	11,123	2,530
1977	16,410	1,689
1978	33,136	1,838
1979	51,493	5,899
1980	108,000[a]	-

(Source: Antwort der Bundesregierung auf die Grosse Anfrage der Fraktionen der SPD und FDP - Drucksache 8/3753, June 20, 1980, [a]based on interview in Zirndorf, November, 1981.)

When "false" asylum seekers poured into Germany in the 1978-1980 period (see Table I), the government altered procedures for abjudicating claims to asylum status and changed policies pertaining to the socio-economic privileges of asylum seekers while claims were being decided. As the right to asylum is included in the West German constitution (article 16 of the Basic Law), any foreigner who claims to suffer from political persecution is guaranteed the right to a hearing. It is conceivable, then, that a huge number of aliens might arrive and claim asylum status, but measures taken by the government in recent years make asylum status less desirable and less likely to be abused by economically motivated migrants. The Germans did not find it necessary to pass a law which would give the

Chancellor emergency powers to cope with migration questions, but strong measures to curb abuse of asylum law nonetheless were taken.

Among Western European nations, the need to strengthen and clarify the legal basis for governmental regulation of alien entry and sojourn perhaps has been most keenly felt in France. Over the last three or so years, the French have been debating the wisdom of significantly increasing the powers of the government in the area of immigration control. This debate has touched on some of the specific issues raised by the Immigration Emergency Act (for example, the power to detain suspected illegal aliens), but more importantly it illustrates how one Western European country has tried to come to grips with the larger issue raised by the need to respond to the immigration crisis: How can traditional concern for individual rights in democratic societies be reconciled with legal measures which enable democratic societies to regulate alien entry and sojourn effectively?

THE BONNET AND BOULIN-STOLERU LAWS

The government's effort to reduce immigration to France after the 1974 recruitment stop was frustrated by several legal setbacks. A number of aliens who had been expelled were permitted to return to France after the Conseil d'Etat (State Council), which monitors the legality of French governmental practices and can be appealed to directly by anyone on French territory, citizen or noncitizen, ruled in their favor.[3] Then a regulation which would have suspended further immigration to France by dependents of foreign workers was criticized for its dubious legality and finally had to be rescinded.[4] Controversies also arose as to the legality of governmental detention centers for alleged illegal aliens, such as at the clandestine Arenc center in Marseilles, and the State Council forbade arbitrary detention without judicial review.

Feeling handcuffed by a lack of clear legal authority to take steps deemed necessary to restore governmental control over immigration, the government proposed two laws which would modify the 1945 law governing the entry and residency of aliens. The Bonnet law, named after Minister of Interior Christian Bonnet, sought to clarify and strengthen governmental power over decisions to admit and exclude aliens at borders, to legalize detention (internment) and refoulement, and to expand the number of offenses which subject aliens to deportation. The second bill, named after the late Minister of Labor Robert Boulin and the former Immigration Secretary Lionel Stoleru, pertained mainly to work and residency permit regulation. The bill sought to simplify the complex work and residency permit system by fusing the two permits and to enable the government to deport aliens whose permits were not renewed. Mr. Stoleru's statement, "...that what was once an immigration country will become an emigration country," succinctly suggests the motivation behind the government-backed legislation.[5]

The two bills caused a storm of controversy. Compared to the United States government, the French government already enjoyed greater immigration enforcement powers. The French police could, and did, stop suspected illegal aliens in Parisian subways and sometimes entire neighborhoods were blocked off for identity checks. All foreigners are required to carry visas or passports while French citizens carry national identity cards. But the government wanted to install a nation-wide computer link-up which would enable the police to verify the identity of aliens in a matter of minutes. This would have endowed France with an alien identification system similar to that of West Germany. However, the plan also called for the distribution of new, noncounterfeitable identity cards for citizens and non-citizens. While only information on foreigners was to be stored by the police, it was feared that the entire plan might lead to

violations of individual rights. In a country where memories of World War II are still vivid, the idea of the computerized, nation-wide identification system raised fears as did the idea of noncounterfeitable identity cards.

The perception that the government's legislation would endanger the liberties of French citizens was coupled with a perception that the government was out to redefine the rights of aliens in a more restrictive sense. Many Frenchmen opposed the legislation on the grounds that foreigners should not be made to bear the costs of the economic recession. The Boulin-Stoleru bill would make unemployed foreign workers deportable due to nonrenewal of permits.

The two laws were extensively debated in the National Assembly and Senate in 1979 before being passed into law by early 1980.[6] The vociferous opposition of some members of the majority coalition in addition to minority party opposition led to numerous amendments of the original bills. However, the two laws still gave the government the right to detain aliens for several days prior to deportation, the right to deport several new categories of immigration law offenders (such as possessors of counterfeit documents and expired visas), and the right to demand additional documents of aliens requesting visas, so-called repatriation guarantees.

One major consequence of the laws was a rapid increase in the number of officially registered deportations (13,537 in 1980 as opposed to only 4,329 in 1979).[7] Many of the deportation cases involved minors. In some instances, North African children who had grown up in France were deported to native countries which they scarcely knew. Allegations that thousands of aliens were being deported without judicial appeal sparked a protest movement which culminated with a highly publicized hunger strike by a Catholic priest, a Protestant minister, and a young Algerian awaiting deportation in Lyon.[8] The hunger strike coincided with the Presidential election campaign and finally prompted Mr. Bonnet

to suspend temporarily all deportations of foreigners. When the new Socialist government assumed office, one of its first acts in the summer of 1981 was to reaffirm the suspension of deportations except in special national security cases. The government also moved quickly to abrogate the Bonnet and Boulin-Stoleru laws which it regarded as threatening to public liberties and to the rights of foreigners.

PLUS CA CHANGE, PLUS C'EST LA MEME?

In September of 1981, a new law on the entry and residency rights of foreigners was passed.[9] To the surprise of some observers, the Socialist legislation bore more resemblances than differences to the laws it was abrogating. The legal right of the government to deport aliens was restricted to cases "imperious to public order." But the government would still be able to detain and expel foreigners at the borders and at ports of entry. The Border and Air Police still would be able to demand documents, in addition to a visa or passport, of unspecified categories of aliens but a refusal to grant entry on the basis of the documents provided would now have to be justified in writing to an administrative authority.

The new government hoped to integrate the foreign population residing in France while making sure that additional unauthorized alien entries did not occur. The former goal required an end to the legal insecurity felt by the foreign population while the latter goal dictated augmenting legal and administrative resources for immigration control. Events of the past year have sorely tried the French government's effort to enlarge the scope of rights for aliens residing in France while holding abuse of immigration and refugee laws to a minimum. Rather than adopting emergency laws to deal with influxes of illegal aliens and widespread insecurity attributable to aliens, the government opted for prudence and reliance upon existing

laws. The number of Border and Air Police has been augmented to enhance border controls while calls for drastic revisions of France's deportation and refugee laws have been rebuffed. In recent weeks, the Mitterand government has indicated that it will establish a computerized data bank (in cooperation with other European Community members) on suspected terrorists. But there are no plans to establish a nation-wide computer data bank on aliens as envisaged by Mr. Bonnet. Indeed, the French government has repeatedly stressed the need to differentiate legally-established foreign workers from aliens linked to acts of terrorism.[10]

COMPARATIVE FINDINGS

Although the French and German governments have been hard pressed by abuses of their immigration and refugee/asylum laws, they have not felt the need to adopt specific legislation for immigration emergencies. European governments have, however, sought to increase and clarify their legal powers to prevent unauthorized entry and residency. The French President does possess broad emergency powers under Article 16 of the 1958 French Constitution which perhaps could be invoked during an immigration emergency. However, the Constitution states that only when "...the independence of the nation, the integrity of its territory or the fulfillment of its international commitments are threatened in a grave and immediate manner and when the regular functioning of the Constitutional governmental authorities is interrupted..." may emergency powers be invoked.[11] Due to the fact that the Presidential emergency powers invoked under Article 48 of the Weimar Constitution paved the way to the Nazi seizure of power, the German Chancellor's emergency powers (the West German President now is largely a figurehead) were strictly limited, in comparison to the French and American situations, until 1968. Then, in the face of mounting urban terrorism,

emergency powers were expanded after a bitter national debate.[12] The German Chancellor now possesses extensive emergency powers which conceivably could be invoked during an immigration emergency of enormous magnitude. The concept of state emergency is applicable when the German lower house (Bundestag) declares that a state of emergency (Spannungsfall) exists under Article 80a of the Basic Law. The notion of a legislative emergency (Article 81) applies only when a vote of no-confidence is lost but no alternative government to the existing government can be formed.

France and Germany are members of the European Community and their laws must be consistent with Community law. It is difficult to imagine how restraints on an individual's right to leave his or her country could be reconciled with the freedom of movement provisions of the Treaty of Rome and other international treaties signed by France and West Germany. Other restrictions foreseen under the Emergency Immigration Act seem consistent with European laws prohibiting the transportation and harboring of illegal aliens. Vehicles transporting illegal aliens can be impounded. The West Germans levy a fine on air carriers who bring in illegal aliens. Special visas and other forms of travel restrictions on classes of aliens suspected as potential law abusers have been imposed. Perhaps the French and Germans have not felt it necessary to pass immigration emergency legislation because they regard the immigration situation as an ongoing crisis which can only be dealt with by far-reaching, comprehensive immigration policy reform.

FOOTNOTES

[1]See, Le Monde, September 8, 1981, Le Matin, September 11, 1981 and Liberation, September 5-6, 1981.

[2]See Le Monde, August 14-17, 1982.

[3]Ibid., September 29, 1977, p. 16.

[4]The New York Times, October 30, 1977, p. 6.

[5]Le Nouveau Journal, October 8, 1977.

[6]Le Monde, April 19, May 29 and July 5, 1979, Droit et Liberte, Number 380, May, 1979, p. 23.

[7]Based on a table excerpted from the Commission des Lois du Senat reproduced in Presse et Immigre's en France, Serie Problemes et Evenements, Number 20, 1981, p. 18.

[8]Presse et Immigre's en France, November 18, 1981.

[9]Ibid., Number 20, 1981.

[10]Le Monde, August 17, 1982.

[11]William Safran, The French Polity, (New York: David McKay, 1977), p. 304.

[12]See Arnold J. Heidenheimer, The Governments of Germany, Third Edition, (New York: Crowell, 1971), pp. 74-76.

Senator SIMPSON. Thank you very much.
Now, please, Professor Maier.

STATEMENT OF PROF. HAROLD MAIER

Professor MAIER. Mr. Chairman, it is a great pleasure to be here.
My particular area of interest is the constitutional law of foreign affairs, and therefore I would like to address for just a few moments some of the structural aspects of this bill.

First, I think it is important that we recognize what we are not talking about. There is not any doubt about the Nation's power to exclude aliens. It has been suggested that the President acting alone, under his inherent powers under the Constitution, can do that. And it is quite clear in terms of the existing case law that the Congress, acting together with the President, can exclude aliens from the country to any degree that they wish, because the Congress and the executive branch together represent the full sovereignty of the United States.

So, what we are really talking about in this bill is not whether or not the United States can exclude aliens, acting in the way in which it does, but rather whether the Congress and the Executive, acting together in this way, can take the steps that they wish to take.

I would suggest that it is probable that given a showing of serious potential harm to the United States, the President could act in this respect even without statutory support. It is absolutely clear, however, f[illegible]n the context of this bill that when the President and the Congress act together, as this bill contemplates, certainly, then the principles of separation of powers, at least, do not prevent the measures which are proposed from being adopted.

Now, even if the statute is viewed as a delegation of powers by the Congress under the naturalization clause or the commerce clause or perhaps the necessary and proper clause, the standards

which are required for delegation in the United States are, in fact, met.

The Supreme Court has said that intelligible standards must be set forth in the bill which delegate powers from the legislative branch to the executive branch. It is clear that the standards set forth in this bill meet that test. In fact, most cases uphold delegation as long as the result to be achieved is clear; that is, even if the manner or means by which it is to be achieved are vague or imprecise, as long as the President is directed in terms of the result he should reach. That has normally been accepted as a sufficient standard to meet the delegation test.

The Immigration Emergency Act, as proposed, is every bit as specific in the standards it establishes for Executive conduct as was the Trading with the Enemy Act, for example, where much of the emergency power during the last 50 years has found its source.

Even if the President already has sufficient power to deal with serious emergencies under the International Economic Emergency Powers Act or the National Emergency Act, I think that this proposed legislation is very useful. It is especially appropriate if the President's inherent powers include the authority to achieve these results by himself. I say it is especially appropriate that the legislation be passed even in that event.

Neither of the more general emergency powers acts that I have referred to are directed precisely at the problem addressed by this bill. Presidential action taken under them might well exceed the scope of the action permitted under those bills. In any event, the focus specifically upon the immigration emergency which this bill provides is a very useful one.

Adopting the current bill, I think, would both encourage the President to act in the case of an immigration emergency by providing pre-existing political support, and it would also implicitly restrain the President from going beyond the parameters of this bill, since the act would define those areas in which the President and Congress are agreed that he ought to act, and that I think is very valuable.

Last, I do have serious reservations about the wisdom of using the term "emergency" in connection with this immigration bill at all. The emergencies described in this bill appear to be considerably less intense and less broad than those described in the other emergency legislation.

There is nothing in this act, I think, that could not be accomplished under a straight rulemaking delegation by Congress which would permit the President to make rules and act in specified ways when the conditions set forth in the bill are met.

If everything becomes an emergency, then nothing is an emergency. I think it is very important that Congress be careful not to begin to designate narrow areas as emergency areas when, in fact, the whole issue of emergency powers is one which intimately interrelates the role of the President and the Congress in a broad spectrum of activities.

I do not believe it would endanger the bill's constitutionality to remove the emergency characterization. In fact, if one looks at prior emergency bills, what those bills really were, were bills which

provided certain means by which the President could act when a general emergency occurred.

We already know what the circumstances are under which we would like the President to act, and it strikes me that the emergency designation here may do more harm than good and certainly is not required to support the constitutionality of the bill.

Thank you.

[The prepared statement of Harold G. Maier follows:]

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PREPARED STATEMENT OF HAROLD G. MAIER

EMERGENCY POWER: LEGISLATIVE AND EXECUTIVE INTERACTION

When Congress and the President act together to make law at the national level, the only limitations on their power are the constitutional limitations on federal governmental power generally. If the power to act in a given manner resides in the national government at all, the political branches, acting in concert, can exercise that power. This principle was clearly articulated by Mr. Justice Jackson, concurring in the Steel Seizure Case,[1] when he wrote

> When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate . . . . If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power.[2]

Although this statement is dictum and appears solely in a concurring opinion, its logic is inescapable and it accurately states the law.[3] Especially in matters touching foreign affairs, the President and Congress, acting together, can do all that any sovereign nation can do,[4] so long as the act does not contravene an express prohibition of the Constitution.[5] Therefore, the constitutional questions facing the Congress in connection with the Immigration Emergency Act are concerned with whether the federal government can create and enforce the special rules for dealing with aliens in the special circumstances described in the bill, not whether the President acting alone could adopt such measures on the basis of some inherent emergency power.

There is no longer any doubt that the President has independent power to act in emergency situations, at least as long as he does not directly contravene congressional legislation.[6] Furthermore, he has greater emergency powers in matters touching foreign affairs and these include matters connected with aliens and immigration.[7] It is also clear that Congress has power to legislate concerning aliens under Article I, § 8, cl.4, the "naturalization" clause, article I, § 8, cl. 3, the "commerce" cluase and certainly in the light of the general mandate of the "necessary and proper" clause of article I, § 8, cl. 18. Acting together, the executive branch and the legislative branch possess whatever power is necessary to deal with this issue. It is therefore unnecessary in connection with this proposed legislation to determine which component of the emergency power sought to be created is solely within the province of the legislature and which solely within the executive prerogative.

It is clear that the standards set forth in the proposed legislation meet the criteria for effective delegation of legislative power if, indeed, delegation of power is involved. The statute is neither too imprecise nor too broad under the tests applied by United States courts. The general rule is that when Congress delegates power to the executive it must do so under an "intelligible principle" on the basis of which the President can know when and how to act.[8] In cases involving international affairs Congressional delegation may be very broad indeed. The Supreme Court made this clear in Field v. Clark,[9] a case involving delegation of authority to the President to revise duties if he found certain facts concerning foreign countries treatment of United States sugar. The Court wrote

> [I]n the judgment of the legislative branch of the government, it is often desirable, if not essential, for the protection of the interests of people, against the unfriendly or discriminating regulations established by foreign governments, in the interests of their people, to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations.[10]

Congressional limitations on the scope and extent of delegated authority in matters related to foreign commerce may be so vague as to be almost nonexistant. Illustrative is Federal Energy Administration v. Algonquin, decided by the Supreme Court in 1976.[11] That case involved a challenge to the power of the President to impose license fees on certain oil imports under an authorization in § 232(b) of the Trade Expansion Act of 1962. That section provided that where an article was being imported into the United States under circumstances that threatened national security the President could . . . "take such action, and for such time, as he deems necessary to adjust the imports of [the] article . . . ." The Court held that the legislation included sufficiently intelligible standards to meet any attack on improper delegation grounds. The discretion granted to the President to determine which of several measures to select to deal with the imports in question was reasonable and did not violate the principle that Congress could not delegate authority without indicating its scope and extent.

The courts have in these cases given very broad scope to Congress' ability to delegate and a reasonableness standard is applied. The best recent analysis of the related roles of the Congress and the President in dealing with emergency powers is found in United States v. Yoshida International, Inc.[12] In that case the President, acting under the authority of emergency powers under the Trading with the Enemy Act, had imposed an import duty surcharge of 10% across the board. The emergency power provision permitted the President to "regulate . . . importation . . . of . . . any property in which any foreign country or a national thereof has any interest."[13] The court found that this language, interpreted liternally, gave the President power to impose the surcharge and no greater specificity was required. The court, referring to Congress, wrote "Having left the battlefield, it would hardly do to dictate all the weapons to be used in the fight."[14]

Pointing out that the validity of the President's acts was to be judged by what was done, not by what mght have been done under a broader interpretation of the congressional authorization the court laid down the following rule:

> A standard inherently applicable to the exercise of delegated emergency powers is the extent to which the action taken bears a reasonable relation to the power delegated and to the emergency giving rise to the action. The nature of the power determines what may be done and the nature of the emergency retricts the how of its doing, the means of execution. Though courts will not normally review the essentially political questions surrounding the declaration or continuance of a national emergency, they will not hesitate to review the actions taken the response thereto or in reliance thereon. It is one thing for courts to review the judgment of a President that a national emergency exists. It is another for courts to review his acts arising from that judgment.[15]

As this passage makes clear, the determination by the executive that an emergency exists or the determination by Congress of the circumstances that will constitute an emergency will be left undistributed by the courts. The actions of the executive will be reviewed, however, to determine whether they conform to the congressional mandate and relate reasonably to the situation in connection with which the emergency power is invoked.

Although the courts speak in terms of standards for "delegation," one can also view emergency legislation as if it involved no delegation at all. It can be viewed equally well as a cooperative exercise of concurrent power. Under that view whether the legislation provides an "intelligible principle" under which the executive can act is irrelevant, except to the extent that the legislation must be sufficiently clear as not to be void for vagueness. In fact, if the joint objective of the political branches is clear, any executive rule-making authority reasonably related to that objective will be upheld.

The remainder of this submission addresses two issues. The first is whether the President has sufficient inherent emergency authority in his constitutional role as chief executive to make this legislation unnecessary. The second issue is the relationship of this proposed act to other legislation dealing with emergency powers, especially the National Emergencies Act.[17]

"Inherent" Emergency Powers

Whether the President has "inherent" powers to act in case of national emergency has been the subject of considerable debate throughout much of the history of the United States.[18] Much of the conceptual difficulty arises from the use of the word "inherent" to describe these powers. That word suggests a power adhering to the occupant of the White House but located, somehow, outside the constitutional scheme. A clearer formulation of the question is to ask whether power to act in a national emergency has been conferred on the President as part of the general executive power directly granted to him under Article 2, paragraph 1, of the Constitution. In this sense, of course, the power is still "inherent" in the President's designation as chief executive but asking the question in this way makes it clear that the inquiry goes to the issue of what power the constitution confers by means of this broad charge, not what power the President can seize because of his ability to act more quickly and more directly than the other governmental branches.

The country's chief executive must necessarily have the power to decide and act as expeditiously as possible when the need for quick action arises. Given this necessity, it is clear that the ability to act in emergencies must have been constitutionally conferred on the President as part of the grant of Executive power. If this were not so, the country would be paralized in those situations where action is most needed and, in fact, the framers of the Constitution would have created a government impotent in the face of threat, an objective that they clearly did not intend. This conclusion stems from an organic conception of the state and emphasizes the functional nature of the division of constitutional powers rather than attempting to characterize of the power of the President by analysis of predetermined and relatively firm conceptual categories.[19] In this sense, it is a functional and practical conception. While it is true that the scope and content of the President's power to act in emergencies is undefined in the Constitution, historic practice has made it apparent that the functional ability of the President to act quickly and decisively without the delays that are inherent in the legislative process has made arguments about whether the President has textual "constitutional" authority generally irrelevant. The dynamic that is the constitutional process is a function of practice, not of words, and hortatory invocations of "the Constitution" to attack the exercise of executive initiative in emergency situations fulfills a political function at best.

A more important consideration is the degree to which the other branches of government can or should act to discourage or encourage the exercise of executive initiative in emergency situations. The lack of a clear constitutional mandate to act is a two-edged sword. Although it permits initiative, it also serves to guarantee that the President must seek to act wisely and with reasonable restraint, or he acts at his peril. Thus, where Congress is explicit about the nature of the problem to be addressed and about the approach to be taken in resolving it, the President has guidance about the appropriate means to carry out his duty as chief executive. Whether the President could act with "inherent" power in the situations described in the legislation becomes irrlevant. His power to act is exclusive, but his power to establish the norms that shall determine the legitimacy of his actions is not. His ability to act is strengthened, if not created, by legislative endorsement.

Another effect of passing legislation such as this will be to create an implicit restraint on the President. The Act will define those areas in which the President and Congress are agreed that he has power to act and, consequently, will identify those actions that he can take with the least peril of confrontation with the legislative branch or of having his action overturned in the courts. A Congressional mandate defining emergency circumstances increases the likelihood tnat any Presidential act outside the scope of this mandate will be judged harshly since the President would clearly have parted company with the other political branch and have struck out on his own. In that instance, the validity of his act would be supported solely by his own authority, now exercised in the clear absence of legislative endorsement or perhaps in implied conflict with the legislative will inferred from possible elements in the act's legislative history. The President's authority to act contrary to the legislative will in situations where the legislative branch has a specific assignment of power as it does in the foreign commerce and naturalization fields is virtually non-existant.

Thus, while one effect of passing this proposed legislation would be to identify clearly the grounds on which there is agreement on the requirements for action, another effect would be to create a valuable implicit legislative inhibition on the exercise of "inherent" Presidential power outside the legislative mandate. The President must and will act in emergency situations. The proposed legislation would perform the dual function of supporting the actions covered by it and discouraging action that is not, without expressly requiring or forbidding either. Thus, it will have taken advantage of the great flexibilities built into the constitutional structure without either abdicating the legislative prerogative or interfering with the executive decision-making dynamic.

Related Legislation

Legislative creation of, or support for, national emergency powers has had a strange and, in some respects, dubious history. Under the provisions of the Trading with the Enemy Act, which granted broad powers to the executive during times of national emergency, there developed through the combination of executive initiative and congressional acquiescence (and, in some instances, active congressional participation) a practice of almost constitutional stature.[20] Over a period of almost 40 years through a series of declared national emergencies, the executive branch expanded its law-making function. That law-making role for the executive became so deeply embedded in the governmental structure of the United States that when an effort was made in the National Emergenices Act [hereinafter NEA] to do away with emergency status and to limit the opportunities for the President to create power by the invocation of the national emergency rubric, § 5(b) of the Trading with the Enemy Act, the authorization under which most emergency power had been exercised, had to be exempted from the NEA and dealt with separately.[21]

Legislation does not give the President power to declare a national emergency. The President, possessing the right of free speech guaranteed by the Constitution and common to all citizens, can declare anything he wishes. The issue for the legislator is what legal effect, if any, shall be given to such Presidental pronouncements. Even without legislative authorization or definition, however, a declaration of emergency by the President is not without effect. A Presidential emergency declaration focuses public attention on the situation so characterized at the highest level and often creates almost irresistible public support to "do something." That "something" is then done by the executive branch and considerations of the abstract constitutionality of the action are subordinated to the realities of public support if it is successful and to political condemnation if it is not. Thus, although the legislature cannot control whether the President characterizes any given situation as an emergency, it can make clear before hand what the effect of such a declaration will be and, by so doing, influence the likelihood that the declaration will be made appropriately and, when made, given its intended effect.

Neither the National Emergencies Act nor the International Emergency Economic Powers Act [hereinafter IEEPA] contains language that would provide specific authorization for the President to act in the manner permitted by the proposed Immigration Emergency Act. Although it is argueable that these two acts contains a mandate sufficiently broad to authorize almost any action that the President might desire to take once the prerequisites for the declaring an emergency are met, neither is directed specifically at the immigration situation. If only the NEA and the IEEPA were available the President would be left without use legislative support for specific measures that might prove useful. The IEEPA is clearly designed to deal with economic emergencies and only an accident of the vocabulary selected makes it applicable to the immigration situation as well.

The NEA is principally designed to control the use of emergency power by the President by providing for its automatic lapse and by defining the circumstances under which such emergency power may be exercised. The NEA appears to have been intended to permit the President to react to emergencies broader in scope that those envisioned by the Immigration Emergency Act. It is clear that there is not conflict between two pieces of emergency legislation and the one proposed. The requirement in § 201(b)(2) of the National Emergencies Act that any legislation that supercedes it must do so explicitly should be observed and an appropriate reference included in the current bill since both the triggering devices and the arrangements for bringing an emergency to an end differ. Since some of the actions that can be taken under the Immigration Emergency Act can also be justified under either or both the NEA and the IEEPA, it would be helpful to make it clear that all measures under the Emergency Immigration Act are subject to its provisions exclusively and that such measures can be continued only through the mechanisms provided in this act, not under procedures permitted under either the NEA or IEEPA.

Lastly, the wisdom of characterizing the immigration issues dealt with in the Immigration Emergency Act as "emergencies" is questionable in any event. The "emergency" nature of the problems addressed appears to be considerably less intense than is true of issues dealt with in existing emergency legislation. There is little legal magic in the word "emergency" except, perhaps, in those instances in which the President seeks to act without prior congressional authorization.

There is nothing in the Immigration Emergencies Act that could not be accomplished by merely removing the word emergency and granting power to the President to act as indicated and to create rules when necessary in the same manner in which other non-emergency legislation operates. If everything becomes an emergency then nothing is an emergency. Dropping the emergency

characterization from this act would not, I believe, endanger its constitutionality and would make it clear that the act is really what it in fact seems to be — an authorization to the executive branch to deal with certain types of illegal mass immigration for which our immigration laws do not currently provide effective procedures.

1. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

2. 343 U.S. at 635-37.

3. L. Henkin, Foreign Affairs and the Constitution (1972), pp. 104-107.

4. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

5. Reid v. Covert, 354 U.S. 1, 18 (1956); see Missouri v. Holland, 252 U.S. 416, 433 (1920).

6. See A. Miller, Presidential Power (1977), pp. 205, 233-28.

7. See Kleindienst v. Mandel, 408 U.S. 753 (1972).

8. Hampton & Co. v. United States, 276 U.S. 394, 409 (1928).

9. 143 U.S. 649 (1892).

10. 143 U.S. at 691.

11. 426 U.S. 548 (1976).

12. 526 F.2d 560 (CCPA, 1975).

13. Trading with the Enemy Act, § 5(b) as amended, 50 U.S.C.A. App. § 5(b).

14. 526 F.2d at 576.

15. 526 F.2d at 579.

16. Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 110 (1948).

17. 90 Stat. 1255.

18. Relyea, A Brief History of Emergency Powers in the United States, Special Senate Committee on National Emergencies and Delegated Powers, 93d Cong., 2d Sess. (1974).

19. Miller, supra note 6, at 200-205.

20. H. Maier, Prepared Statement in "Emergency Controls on International Economic Transactions," Hearings, Trading with the Enemy Reform Legislation, Subcommittee on International Economic Policy and Trade, Committee on International Relations, House of Representative, 95th Cong., 1st Sess. (1977).

21. 90 Stat. 1258, § 502(a)(1).

Senator SIMPSON. Very precise; thank you very much.

I have a few questions. Mr. Miller, you note in your testimony the emergency powers of both the French and the German Governments. Do you know if they have ever been exercised and the circumstances?

Professor MILLER. Well, certainly, in Weimar, Germany we know that emergency powers were exercised.

Senator SIMPSON. Indeed, they were.

Professor MILLER. And this paved the way to the Nazi seizure of power. One of the important points to understand about the Nazi seizure was that it was legal. It was a legal seizure of power, or legal means were used to subvert republican institutions.

Emergency powers were used in France in 1958 when there was the military uprising in Algiers against the Fourth Republic. But to my knowledge, with the exception of recourse to emergency powers to crush largely military opponents of DeGaulle—the secret army organizaton—at the outset, in Fifth Republic France emergency powers have not been invoked even during the 1968 student-worker uprising.

In Germany, there was some implementation of emergency powers in response to the urban terrorism of the Bader-Meinhoff Gang. But, in the German context it is only in the period 1968–78 that there was some limited utilization of emergency powers.

Senator SIMPSON. Were there any calls for emergency action in the Federal Republic of Germany at the time of the Polish mass asylum crisis in 1980?

Professor MILLER. There was a huge influx of Poles, as you well know. There are estimates that range in the hundreds of thousands of Poles going in. But to my knowledge, emergency powers were not invoked; the constitution was not invoked nor considered. They responded to influx with standard operating procedures.

One point that is very important to stress, though, when talking about Poles is that it is German asylee policy not to return someone who flees from a Communist East Bloc country to their homes. The Germans try to more or less hush it up, but they are not going to deport Poles who seek asylum in Germany.

Senator SIMPSON. Have our deliberations here in this country in the awareness of things to be done in immigration and refugee and emergency power situations, and so on, had any impact on legislation in France and Germany? Do you think that any action we do take, if we get to finality of action on this legislation, will have an impact or an influence upon them?

Professor MILLER. It is funny that you asked that question because I brought down an article from Le Monde which I had intended to give to you, which is a report on the Senate passage of the Simpson bill on immigration reform. Certainly, there is an awareness of——

Senator SIMPSON. What was that from?

Professor MILLER. From Le Monde, the almost semigovernmental newspaper in France and probably the most important political institution in France.

Certainly, they are aware of U.S. immigration policy. In my research, I have come across instances in French history back in the twenties and thirties when French officials would talk about re-

forming their immigration laws with reference to the United States. I remember very well cutting out a cartoon from Le Monde concerning the Mariel outpush. It made quite an impact in France and Germany.

I think they would take note of this special legislation, but I do not think they are going to go pass an emergency law on immigration.

Senator SIMPSON. Would you see the need for an emergency powers legislation as being less if, say, the present Simpson-Mazzoli legislation were to pass?

Professor MILLER. I am sorry.

Senator SIMPSON. Would the need for this emergency powers legislation be lessened if that bill were to pass.

Professor MILLER. I think so. The German and French response, as I have indicated in my testimony, has been to reinforce and to clarify governmental powers in what concerns immigration and refugee matters, to attempt to design the laws to handle all possible contingencies without having to have recourse to immigration emergency acts.

Clearly, they are engaged in a process that resembles our own process of immigration legal reform here in the United States, so the answer is clearly "yes."

Senator SIMPSON. Finally, what experience has there been in France or Germany with regard to asylee applicants who have been detained for long periods of time? Has that been permitted by the courts?

Professor MILLER. It has been a big political issue in both countries. I know the French case best. I recall very vividly the controversy over the so-called Arenc detention in Marseille, where alleged illegal aliens were kept for periods of time stretching for weeks before they were deported.

Now, under the new immigration law, the French authorities have the power to detain illegal aliens for 48 hours, and then after that point in time, they have to notify a judicial authority, who then could OK or prolong the incarceration. So, one result of the reform in France has been to deny the Government the right to maintain aliens in detention for a period of time over 48 hours without notifying the legal authorities.

Senator SIMPSON. Thank you.

Professor Maier, in what ways do you think that this proposed legislation might be similar to emergency legislation which has been granted in the past, and in what ways might it differ?

Professor MAIER. I would like to answer that this way. Really, there are two types of emergency legislation that we have had experience with. One is the type which says once an emergency is in existence, then certain powers will flow to the executive branch or to administrative agencies, as the case might be.

The other type tends to set forth standards under which an emergency can be declared and then have legal effect. This legislation appears to fall really into both camps, because what the Congress would do here is to say here is something which constitutes an emergency, and when this thing occurs, then the President is empowered to act in this way. That is one of the reasons I suggested that if one can foresee it in that way, this really is not emergen-

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cy legislation in the sense that historically we have talked about emergency legislation in this country.

For that matter, in the 19th century, and really up until after World War II, the idea of Congress passing legislation which would declare when an emergency would arise just did not happen. The executive branch declared an emergency and then the question was what legal effects would flow from that. Often Congress, retroactively, would then give effect to the declaration of emergency if it believed that there was one. That happened in the Civil War. It happened in the whole history of the Trading with the Enemy Act in World War I, until finally it was superseded and set aside in effect, at least, by the National Emergency Act.

Senator SIMPSON. How should Congress review the exercise of emergency powers in this area, particularly in the area of immigration legislation?

Professor MAIER. I am a firm believer in the reporting function between the executive branch and the Congress. In fact, historically, if one looks at the times that serious difficulties have arisen between the branches on issues like this, it tends to be because inadequate information has been provided.

It strikes me that this bill requires the providing of information in a very effective way. As it says, after a given time, the declared emergency, if you wish to use that term, will lapse and then the President has to restate the reasons for continuing it. I think that is extremely important. Had we had that kind of a system in connection with certain other forms of emergency legislation, particularly the Trading with the Enemy Act, section 5(b), some of the difficulties that arose in connection with that, I think, would not have arisen.

Senator SIMPSON. Do you believe we can really frame a narrow immigration emergency statute, assuming that we would want to do that? What would you suggest? I guess, also, based upon your experience in emergency powers legislation and its use in the past, what pitfalls would you see?

Professor MAIER. I am not sure that one can frame a much narrower statute than one has. This addresses a very specific problem. It addresses the problem that arises when a substantial number of aliens who do not have documents to get into the country either appear to be ready to come or are already coming. It is a very specific circumstance under which the President is permitted to act.

So, unless one wanted to go outside the realm of this particular problem, I think this is a pretty direct focus on a very specific problem--one which some of the witnesses earlier indicated we are likely to have for a while. The only reason that this is really an emergency situation is we had not thought of it before, or at least we had not experienced the circumstances which required us to think of it before. But we are going to be facing it, so I am not sure that one ought to treat it as something that we do not have to—we have to look at this with some care, I think.

Senator SIMPSON. That is certainly very true, as we put, I think, basically a very good piece of legislation on the books in 1980 on refugees, and so on, and then saw things change more dramatically in the time since that passed than in the 70 years before.

I thank you very much, both of you, for your testimony. It is very helpful to us and I appreciate your being here. Thank you.

The final panel of the afternoon: Arnoldo Torres of LULAC, the League of United Latin American Citizens; Arthur Helton, director of the political asylum project of the Lawyers Committee for International Human Rights; and Wade Henderson, deputy director of the Washington office of the American Civil Liberties Union.

It is good to see all three of you. You were back there plotting; I saw you earlier. I think we finally got back on schedule and I hope we have not delayed you.

So, in that order, we will proceed, with Arnoldo Torres first, please.

STATEMENTS OF A PANEL CONSISTING OF ARNOLDO S. TORRES, NATIONAL EXECUTIVE DIRECTOR, LEAGUE OF UNITED LATIN AMERICAN CITIZENS; ARTHUR C. HELTON, DIRECTOR, POLITICAL ASYLUM PROJECT, LAWYERS COMMITTEE FOR INTERNATIONAL HUMAN RIGHTS; AND WADE HENDERSON, DEPUTY DIRECTOR, WASHINGTON OFFICE, AMERICAN CIVIL LIBERTIES UNION

Mr. TORRES. Once again, I appreciate the opportunity to come before the subcommittee on another issue besides immigration legislation. My name, for the record, is Arnoldo Torres. I am the executive director for the League of United Latin American Citizens.

We read the analysis provided to us by the staff of the committee—the administration's explanation of the provisions of this legislative proposal. To begin, a couple of things come to mind. It is unfortunate that there is such a mania that has developed as a result of the boatlift and, subsequently, the Haitian movement, that we have designed and are considering a legislative proposal by the administration that is extremely far reaching and very, very dangerous to simply deal with the problems of one State.

I would not want the record to reflect that we are insensitive, under any circumstances, to the problems that confront Florida, but such a precedent-setting, far-reaching piece of legislation of this nature is somewhat extreme to address that problem.

The concerns that we have deal with the realities of fear. People are concerned that boatlifts and things of this nature will happen again, and unfortunately the response to this potential is extremely paranoiac and is willing to sacrifice the rights of individuals.

We indicate in our written comments that interdiction is an issue in which the very first thing that appears to be expendable are the human and constitutional rights of individuals, and we are vehemently opposed to that.

But to discuss the legislation in the context of the Southwest, here you have a piece of legislation that is designed to deal with the problems of Florida and Cuba, yet we would apply it to situations of the Southwest area of the United States with regard to Mexico.

We raise a number of problems with that issue—the definition of "substantial numbers," the whole criterion that triggers off the use of emergency powers. Would the devaluation of the peso, as recently occurred, require the implementation or the establishment of

emergency powers? Who would initiate the process for determining its application? Would State and local governments have a major role in calling for the emergency powers? What interaction or consultation would this Government have with the Mexican Government? Would we seek their active involvement?

The one thing that really bothered us with the analysis was that, in fact, as Mr. Nelson indicated, an emergency could be declared even if only a few thousand aliens were expected to arrive within a few weeks. Gee whiz, if we go by the INS statistics, we would have an emergency situation in the Southwest every single week, for statistics indicate that thousands of undocumented aliens cross on a weekly basis.

The power to restrict or ban travel of vessels, vehicles and aircraft—if you were to do that along the Mexican border, you would have some tremendous negative consequences to the international commerce that takes place across the border. You would hurt the cities, you would hurt the States, and their economies.

With regard to the search and seizure provisions, we have enough problems now trying to keep the INS in line. You have heard us continuously raise a number of problems with that issue. We read a decision by U.S. District Judge Byrne, who indicated, after barring the deportation of 150 aliens, that, "To say the INS is really interested in the rights of these people is absurd."

Now, those are the concerns that we bring to this type of legislation. The other point that is really a major problem to us is the inclusion of Army, Navy, and Air Force personnel in the execution and enforcement of the powers. Sure, Mr. Enders can indicate to us that Mexico will recognize that these provisions are not being designed to affect Mexico. But there are going to be some serious issues raised and provoked as a result of having a military presence along the border.

Perhaps one of the greatest ironies with this proposal was stated today by the Assistant Secretary of State for Inter-American Affairs, who indicated, in response to a question you asked, "Do you anticipate any other boatlifts from Cuba"—he responded that our intelligence system indicated that at this time, no.

Well, if we have intelligence systems that can tell us something that is going to happen either in Nicaragua, in El Salvador, or, in this case, as the Assistant Secretary indicated, in Cuba, then we should have, certainly, a much different response than having such far-reaching Presidential emergency powers developed simply for immigration use.

We would take this opportunity to discuss some alternatives very briefly. I know that you wanted to plug your immigration bill in the previous panel, and we would say that if that bill does come to pass and we do, in fact, have that law on the books, we should give that bill the opportunity to see if, in fact, it can be effective.

We would also encourage bilateral discussions with countries that we know have a high push factor. We would urge the subcommittee to seriously undertake an examination of the Federal agencies' capabilities to deal with such crisis situations as that of the Mariel boatlift. We feel that this is a much more prudent approach than getting into the whole issue of Presidential powers simply for

immigration needs. We think it just feeds the whole scope of paranoia that we have right now.

Thank you.

[The prepared statement of Arnoldo S. Torres follows:]

PREPARED STATEMENT OF ARNOLDO S. TORRES

GOOD AFTERNOON, MEMBERS OF THE SUBCOMMITTEE ON IMMIGRATION AND REFUGEE POLICY. MY NAME IS ARNOLDO S. TORRES, AND I AM THE NATIONAL EXECUTIVE DIRECTOR FOR THE LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC), THIS COUNTRY'S OLDEST AND LARGEST HISPANIC ORGANIZATION LULAC AND ITS 106,000 MEMBERS ARE ORGANIZED IN 44 STATES IN THE UNION. WE APPRECIATE THE OPPORTUNITY TO COME BEFORE TO DISCUSS OUR VIEWS ON THE ISSUE OF PRESIDENTIAL IMMIGRATION EMERGENCY POWERS.

IT IS CLEAR THAT THE 1980 CUBAN FLOTILLA HAS HAD A TREMENDOUS IMPACT ON THE AMERICAN PUBLIC WITH REGARDS TO ITS VIEWS AND IMPRESSIONS OF IMMIGRATION. DUE TO THE BARRAGE OF CELEBRATED MEDIA STORIES OF VARIOUS ASPECTS OF CUBANS FLEEING TO THE U.S., AMERICANS EVENTUALLY BEGAN TO BELIEVE THAT THE SHORES OF SOUTHEAST AMERICA WERE UNBELIEVABLY CROWDED WITH CUBAN REFUGEES. IN ADDITION, THE FLOW OF HAITIAN REFUGEES DURING THE LAST YEAR AND ONE-HALF HAS ALSO FED THIS IMAGE. WE WILL NOT, NOR CAN WE DESAGREE WITH REALITIES WHICH THE STATE OF FLORIDA HAS BEEN CONFRONTED WITH AS A RESULT OF THESE FLOWS. HOWEVER, WE DO NOT BELIEVE THAT THESE PEOPLES SHOULD OR CAN BE BLAMED FOR EVERY PROBLEM FLORIDA IS FACING TODAY. SURELY, THE ECONOMIC PROBLEMS OF UNEMPLOYMENT AND ITS CONSEQUENCES CANNOT BE LAID TO REST ON THESE REFUGEES. YET MANY HAVE AND CONTINUE TO DEMAGOGUE THE ISSUE BLAMING CUBAN AND HAITIAN REFUGEES FOR EVERY PROBLEM PLAGUING FLORIDA. WE CERTAINLY DO BELIEVE NEVERTHELESS, THAT STATES SHOULD BE PROVIDED ASSISTANCE TO DEAL WITH SITUATIONS ARISING FROM SUCH AN INTENSE INFLUX OF PEOPLE.

WITH THIS IN MIND, WE REGARD THE LEGISLATIVE PROPOSAL BY THE ADMINISTRATION CALLING FOR PRESIDENTIAL IMMIGRATION EMERGENCY POWERS AS AN EXTREME ATTEMPT TO DEAL WITH SITUATIONS SUCH AS THE CUBAN AND HAITIAN FLOTILLA. WHILE MATTERS PERHAPS

COULD BE ADDRESSED, UNDER SUCH PROVISIONS; THE CONSEQUENCES TO HUMAN AND CIVIL RIGHTS, TO INTERNATIONAL RELATIONS AND MAJOR ADMINISTRATIVE UPHEAVALS WOULD NOT BE WORTH THE RISKS WHEN THERE ARE OTHER LESS DRASTIC AND REASONABLE ALTERNATIVES AVAILABLE. CLEARLY, WE COULD ALL LIKE TO AVOID SUCH CRISIS SITUATIONS HOWEVER IT IS PRUDENT AND IN THIS COUNTRY'S BEST INTEREST TO PLAN AHEAD IN ORDER TO MINIMIZE SUCH CRISIS OR BE ABLE TO EFFECTIVELY DEAL WITH THEM.

CRITIQUE OF LEGISLATIVE PROPOSAL

THE PROPOSAL AND ITS ACCOMPANYING ANALYSIS EMPHASIZES ITS TARGET AS STOPPING ANY POTENTIAL CUBAN FLOTILLA'S FROM OCCURING. IT IS DESIGNED TO PRIMARILY RESTRICT SUCH ACTIONS AS THOSE UNDERTAKEN BY U.S. CITIZENS DURING THIS REFUGEE MOVEMENT. IT FAILS TO CONSIDER THE DIFFICULTIES IN ATTEMPTING TO APPLY THESE PROVISIONS TO CIRCUMSTANCES ARISING IN SOUTHWEST STATES AND WITH THE COUNTRY OF MEXICO. WE ARE EXTREMELY CONCERNED WITH THE CRITERIA WHICH THE PRESIDENT IS TO BASE A DECLARATION OF EMERGENCY. THE CONDITIONS INDICATED:

(1) A SUBSTANTIAL NUMBER OF UNDOCUMENTED ALIENS ARE ABOUT TO EMBARK OR HAVE EMBARKED FOR THE UNITED STATES; (2) THE PROCEDURES OF THE IMMIGRATION AND NATIONALITY ACT OR THE RESOURCES OF THE IMMIGRATION AND NATURALIZATION SERVICE WOULD BE INADEQUATE TO RESPOND TO THE EXPECTED INFLUX; AND (3) THE EXPECTED INFLUX OF ALIENS WOULD ENDANGER THE WELFARE OF THE UNITED STATES OR OF ANY UNITED STATES COMMUNITY, ARE VERY BROAD AND FLEXIBLE. IN OUR OPINION THERE IS MUCH TOO FLEXIBILITY GIVEN TO THE PRESIDENT IN VIEW OF THE TREMENDOUS AND FAR-REACHING POWERS HE COULD EXERT UNDER SUCH AN EMERGENCY.

In examining the application of these provisions to the reported influx of undocumented workers from Mexico, as a result of devaluation of the peso, would emergency powers be required? Who would initiate the process for determining its application? Would state and/or local governments have a major role in calling for emergency powers as they do in disaster situations? What interaction or consultation would this government have with the Mexican government? Would we seek their active involvement?

These are some of the questions and issues which arise when considering the applicability of these provisions to circumstances which have or more readily occur along the U.S.-Mexico border. The Administration in its analysis indicates that emergency powers "could be declared even if only a few thousand aliens were expected to arrive," therefore emergency powers would be in effect virtually always in view of statistics maintained by the Immigration and Naturalization Service (INS) which reflect thousands of illegal crossings daily and weekly. Such a situation would have dire negative impact on the economy of the border states both for the U.S. as well as Mexico. International commerce along the border could be stifled therefore resulting in significant additional problems.

The power to restrict or ban travel of vessels, vehicles and aircraft to targeted countries could create severe problems for relations between U.S. and Mexico as a result of our contiguous borders. Clearly, it is much easier to control travel if countries are separated by water. Again, the economic ramifications for U.S. and Mexico border states could be more disruptive than anticipated.

WITH REGARDS TO INTERDICTION, WE ARE VEHEMEMTLY OPPOSED TO THE IDEA FOR INEVITABLY THE HUMAN AND CONSTITUTIONAL RIGHTS OF INDIVIDUALS BECOME EXPANDABLE. ALSO, HOW WOULD INTERDICTION OCCUR WHEN CONSIDERING COUNTRIES WHO ARE CONTIGUOUS?

ANOTHER MAJOR CONCERN ARISES FROM THE SEARCH AND SEIZURE PROVISIONS. DESPITE THE EMPHASIS WHICH IS MADE BY THE ADMINISTRATION WITH RAGARDS TO ADHERENCE TO THE FOURTH AMENDMENT IT HAS BEEN OUR EXPERIENCE THAT THE INS HAS NOT AGGRESSIVELY COMPLIED WITH CONSTITUTIONAL PROTECTIONS. "OPERATION JOBS" AND A RECENT 9TH CIRCUIT COURT DECISION SUPPORT OUR BELIEF THAT THE IMMIGRATION AND NATURALIZATION SERVICE (INS) IS NOT OPERATING WITHIN ANY GUIDELINES DESIGNED TO REDUCE, MUCH LESS PREVENT, THE VIOLATIONS OF A PERSON'S HUMAN AND CIVIL RIGHTS. LULAC IS NOT THE FIRST TO CONCLUDE THAT PROTECTING THE RIGHTS OF THOSE WITH WHOM INS OFFICIALS INTERFACE, IS INCONSISTENT AND CONTRADICTORY TO THEIR RESPONSIBILITY OF IMMIGRATION ENFORCEMENT. U.S. DISTRICT COURT JUDGE BYRNE OBSERVED AFTER BARRING THE DEPORTATION OF 150 ALIENS THAT, "TO SAY THE INS IS REALLY INTERESTED IN THE RIGHTS OF THESE PEOPLE IS ABSURD." FURTHER, A RECENT FEDERAL COURT DECISION PROHIBITS THE INS FROM DETAINING WORKERS FOR QUESTIONING UNLESS ITS AGENTS CAN SHOW A REASONABLE SUSPICION THAT EACH INDIVIDUAL QUESTIONED IS AN ILLEGAL. THE COURTS RULING WAS PROMPTED BY THE TACTICS EMPLOYED BY THE INS DURING AREA "SURVEY" OPERATIONS.

IN ADDITION, THE USE OF THE MILITARY INCLUDING THE ARMY, NAVY AND AIR FORCE, IN THE EXECUTION AND ENFORCEMENT OF THE EMERGENCY IMMIGRATION POWERS IS A MAJOR DEVIATION FROM THE MANNER IN WHICH THE MILITARY HAS BEEN UTILIZED FOR DOMESTIC PURPOSES. THE PRESENCE AND USE OF THE MILITARY IN SUCH SITUATIONS, IN OUR OPINION, WOULD ESTABLISH AN EXTREMELY DANGEROUS PRECEDENT AND CAUSE COMMUNITY UPHEAVALS ALONG THE

BORDER. WE WOULD ALSO QUESTION THE NECESSITY OF HAVING ANY MILITARY INVOLVED CONCERNING IMMIGRATION EMERGENCIES WHEN THEIR ROLE HAS HISTORICALLY BEEN RESERVED FOR CASES OF NATIONAL SECURITY. THERE ARE OTHER PROVISIONS IN THE LAW WHICH ALLOW FOR THEIR INVOLVEMENT SHOULD THIS BE A THREAT TO OUR NATIONAL SECURITY.

IN CLOSING, WE WOULD EMPHASIZE THE NEED TO ALLOW IMMIGRATION LEGISLATION TO PASS CONGRESS BEFORE ANY FURTHER DISCUSSION ON PRESIDENTIAL EMERGENCY IMMIGRATION POWERS. TIME MUST BE GIVEN TO ANALYZE AND ASSESS THE EFFECTIVENESS OF SUCH LEGISLATION AND ITS IMPACT ON IMMIGRATION FLOWS. IN ADDITION, WE STRONGLY BELIEVE AND ADVOCATE THAT, WHERE POSSIBLE, THE U.S. GOVERNMENT SHOULD UNDERTAKE SERIOUS DELIBERATIONS WITH COUNTRIES WITH HIGH PUSH FACTORS TO DISCUSS BILATERAL EFFORTS TO CONTROL SUCH FLOWS. FURTHERMORE, SUFFICIENT FUNDING SHOULD BE PROVIDED TO THE INS TO INSURE ITS ABILITIES TO CARRY OUT ITS MANDATE MORE EFFICIENTLY AND EFFECTIVELY. ALSO, WE WOULD URGE THIS SUBCOMMITTEE TO SERIOUSLY UNDERTAKE AN EXAMINATION OF FEDERAL AGENCIES CAPABILITIES TO DEAL WITH CRISIS SITUATIONS, SUCH AS THE CUBAN FLOTILLA. AS EVIDENCED BY THIS EPISODE, THE LEVEL OF RESPONSE, COORDINATION AND OVERALL EFFECTIVENESS OF FEDERAL AGENCIES INVOLVED IN DEALING WITH REFUGEES WAS STRENUOUSLY CRITICIZED AND REQUIRES A SERIOUS ASSESSMENT.

AGAIN, WE WOULD URGE THE ABOVE ACTIONS BEFORE ANY FURTHER ATTENTION IS GIVEN TO PRESIDENTIAL EMERGENCY IMMIGRATION POWERS LEGISLATION. FOR THE REASONS AND ISSUES WE RAISE, WE CANNOT SUPPORT THE PASSAGE OF ANY SUCH LEGISLATION.

THANK YOU.

Senator SIMPSON. Were you plugging the bill there, Arnoldo?

Mr. TORRES. No, no. I was just simply saying that if you have legislation that passes, we should give the opportunity to have it's proponents' claims be assessed and analyzed.

Senator SIMPSON. Do not lose that transcript; I want it forever. [Laughter.]

I understand what you are saying.

Now, please, Mr. Helton.

STATEMENT OF ARTHUR C. HELTON

Mr. HELTON. Good afternoon, Mr. Chairman. I am honored to appear before you and the subcommittee.

The proposed Immigration Emergency Act which is the subject of this hearing raises a whole host of issues regarding whether or not aliens and citizens will be deprived of rights under the Constitution, statutes, and treaties of the United States. Some of those concerns have been addressed by other witnesses, including a witness on this panel, and I am sure those concerns will continue to be addressed.

However, I would like to limit my remarks to the matters that I featured in the statement that was submitted and to elaborate upon that statement with respect to the likely impact of the proposed detention power and the proposed interdiction power on applicants for political asylum in the United States.

In particular, during the last year the Lawyers Committee for International Human Rights has played a substantial role in the representation of Haitians who have applied for political asylum in the United States. Some of our experience in that area, I think, will highlight some of our concerns and the problems that we foresee with respect to the enactment of this legislation.

In particular, the legislation that is being proposed here today does not purport to limit, on its face, the right to counsel that an alien has, including an applicant for political asylum. However, in the interdiction context as well as in the detention context, that right to counsel is effectively denied.

In the interdiction context, the alien and potential asylum applicant simply has no access to counsel. With respect to detention, I can share with you a particular example that occurred during the most recent effort to represent detained Haitians.

Haitians in detention at Camp Raybrook, near Lake Placid in upstate New York, numbered about 150 during the past year. Only three of those Haitians, however, were able to achieve representation by lawyers in that remote locality. The power to detain and to transfer to facilities in remote localities under the proposed legislation will, in effect, deny applicants for political asylum access to counsel.

Only now, when those 150 Haitians have been released pursuant to an order of a Federal court in Miami, have they been able to achieve representation.

Second, prolonged detention, we submit, will effectively deny the right to apply for political asylum. This legislation does not purport to limit that right. However, we submit that in practice, the prolonged detention under the legislation will actually coerce appli-

cants for political asylum into giving up their claims for asylum and returning to face persecution.

If I can simply quote briefly from my statement at page 8, one Haitian who returned voluntarily in June 1982 told a Federal judge:

> After eleven months in detention in the United States, I wish to return to Haiti. My decision is based on the fact that over the past month, I have become very depressed and ill and have not been able to receive medical treatment. I wish to state that this decision to leave in no way indicates a change from my previous position of fearing political persecution upon return. I fully expect that I may be mistreated or even killed upon my return to Haiti. However, I would rather die in my own country than remain any longer in prison in the United States without any indication that I will ever be released.

The emergency powers sought by the Executive in connection with this legislation, we submit, violate the rights of asylum applicants and is offensive, as we detail in our statement, to international and domestic law relating to the protection of refugees. For that reason, in this form, we oppose the legislation.

Thank you.

[The prepared statement of Arthur C. Helton follows:]

PREPARED STATEMENT OF ARTHUR C. HELTON

INTRODUCTION

Thank you, Chairman Simpson, for inviting our views at today's hearing. My name is Arthur Helton. I am Director of the Political Asylum Project of the Lawyers Committee for International Human Rights in New York.

Since 1978, the Lawyers Committee has been a public interest law center working in the areas of international human rights, refugee and asylum law. The Political Asylum Project of the Committee was created in late 1980 to provide representation to individual asylum applicants in the United States. The Project utilizes volunteer lawyers whom it trains and supervises. Since 1978, the Lawyers Committee has represented more than 250 asylum applicants from 33 countries. Based on this experience, the Committee has testified in Congress and prepared papers on various asylum and refugee policy matters.

Our testimony today examines the Reagan Administration's proposed Immigration Emergency Act. The proposed legislation raises several questions as to whether the emergency powers sought by the executive branch will, if exercised, deprive aliens of rights under the Constitution, statutes, and treaties of the United States. Our examination in this respect is limited to the likely impact upon asylum applicants of the broad new powers conferred by the Act to interdict or detain arriving aliens. In our view, these powers run afoul of the entitlements of applicants for political asylum in the United States under domestic and international law.

THE INTERDICTION AND DETENTION PROVISIONS

Section 240A of the proposed Act provides that the executive can utilize various powers, including the power to interdict or to detain arriving aliens, upon a declaration by the President that there is an "immigration emergency" based upon a determination that a mass influx of undocumented aliens is imminent. The declaration extends automatically for a period of 120 days, and is extendable for consecutive periods of like duration. During the declaration, under Section 240A(a)(3):

> The President may order that the arrival in the United States of any aliens or class of aliens who lack documents authorizing entry to the United States or who are otherwise inadmissible and who are traveling directly or indirectly from or in transit through a designated foreign country may be prevented: (i) by precluding the entry of any class or category of vessels, vehicles or aircraft, regardless of nationality, into the territorial sea of the United States or any waters, lands or airspace over which the United States may exercise any customs, fiscal, immigration or sanitary jurisdiction in accordance with international law or obligations as recognized by the United States; and (ii) by returning or requiring the return of such aliens or any class or category of vessels, vehicles, or aircraft subject to the jurisdiction of the United States carrying any such alien to the designated foreign country, or to some other reasonable location; provided that appropriate measures, prescribed by the Attorney General and reasonable under the circumstances, are taken to protect the rights of refugees as recognized by the United States.

Also during the declaration, under Section 240A(b):

> The detention of any alien coming into the custody of the United States as a result of the circumstances leading up to or comprising an immigration emergency shall be in any civilian facility, whether maintained by the Federal Government or otherwise, as the Attorney General may direct, or in any Department of Defense facility, as the Secretary of Defense may direct. The Attorney General may at any time transfer an alien from one place of detention pending a final determination of admissibility, or pending deportation if the alien is found excusable, except in the discretion of the Attorney General, and under such conditions as the Attorney General may prescribe. ... No court shall review any decision of the Attorney General made pursuant to this paragraph to detain, to transfer or to release an alien, except that any person so detained may obtain review, in habeas corpus proceedings, on the question of whether that person falls within the category of aliens subject to detention. The provisions of this subsection shall continue in effect regardless of the termination of the immigration emergency.

These interdiction and detention powers, however, will conflict with the entitlements of asylum applicants under domestic and international law.

THE LIKELY IMPACT OF THE DETENTION POWER UPON ASYLUM APPLICANTS

The international experience indicates that asylum applicants frequently flee persecution in their countries of nationality without valid documentation. The Handbook on Procedures and Criteria for Determining Refugee Status prepared by the United Nations High Commissioner for Refugees, which is considered by the United States to be a persuasive restatement and authority in the analysis of asylum claims,* explains that:

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* Stevic v. Sava, ___ F.2d ___ (2d Cir. 1982), pet. for rehearing denied, ___ F.2d ___ (2d Cir. 1982).

> [A]n applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents (Paragraph 196).

The implementation of the detention power provision could fall disproportionately upon this class of persons, raising a number of legal questions.

A DEPARTURE FROM PRIOR PRACTICE

Initially, detention would be a departure from modern humane practice. Traditional administrative practice with regard to the detention of aliens seeking admission to the United States, at least since the 1950s, has been to release them absent a demonstrable security risk or likelihood of absconding. This has included aliens with or without a passport and/or visa, as well as applicants for political asylum in the United States. This practice is reflected in the INS Immigrant Inspector's Handbook, and was confirmed recently in testimony by two former INS General Counsel, Sam Bernsen and Charles Gordon, at the trial in Louis, et al. v. Nelson, et al., Case No. 81-1260-CIV-EPS, in the Southern District of Florida.

The traditional release policy was recognized by the Supreme Court in 1950 when it explained that the policy was designed to avoid "needless confinement" and that it "reflects the human qualities of an enlightened civilization." Ma v. Barber, 357 U.S. 185, 190 (1958).

See also Petlock, A New Detention Policy of the Immigration and Naturalization Service, 32 Interpreter Releases, 110 (1958), regarding the prior liberal release practice and policy of the Service.

The humanitarian justification for the liberal release policy is further reflected by the remarks of James Hennessy, Executive Assistant to the Commissioner of the Service, before the Senate Judiciary Committee in 1962 concerning the Service's detention policy in the face of massive immigration from Cuba:

> All I can say is that out of 150,000 Cubans in the United States, we are holding 16 in long-range detention. However, I do not get the satisfaction of saying that the percentage is very low. If one is held in detention improperly, that is very bad.

Cuban Refugee Problems: Hearings Before the Subcommittee to Investigate Problems Connected with Refugees and Escapees of the Senate Committee on the Judiciary, 87th Cong., 1st Sess. 209, 212 (1962).

DETENTION IS INCONSISTENT WITH DOMESTIC AND INTERNATIONAL LAW

Many arriving asylum applicants may be imprisoned pending the adjudication of their claims. Aliens are entitled, however, to apply for political asylum in the United States "irrespective" of their immigration status, i.e., whether or not they are documented. 8 U.S.C. Section 1158(a). The Protocol Relating to the Status of Refugees, to which the United States became a party in 1968,* prohibits

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* 19 U.S.T. 6257; T.I.A.S. No. 2322; 606 U.N.T.S. 268.

the imposition of penalties, "on account of their illegal entry or presence", as well as unnecessary "restrictions" on their movement. A detention measure that impacts disproportionately upon asylum applicants would deter aliens from pursuing their statutory right to request asylum, and constitute a penalty and unnecessary restriction under the Protocol.

Additionally, the detention power would be used against selected nationalities. Such express discrimination is, at the very least, legally questionable. Cf., Louis, et al. v. Nelson, et al., supra, declaring illegal the detention policy implemented by the Service in the summer of 1981 in which United States District Judge Eugene P. Spellman found that Haitians were "impacted to a greater degree by the new detention policy than aliens of any other nationality."

Finally, the detention rule heralds the prospect of prolonged imprisonment for many arriving asylum applicants. While indeterminate imprisonment of aliens by itself may be legally infirm,* it has a particular consequence for asylum applicants. The asylum adjudication process makes representation by counsel difficult, and prolonged imprisonment may serve to coerce bona fide refugees into returning to countries where they will be persecuted. This has been the experience with detained Haitians who "choose" to return to Haiti. Prolonged imprisonment has occurred under onerous conditions, frequently in facilities designed but for short-term detention. Upon such imprisonment, some Haitians gave up their right to apply for political asylum. One Haitian who returned "voluntarily" in June of 1982 told a federal judge:

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* See Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980), affd., 654 F.2d 1382 (10th Cir. 1981).

> After 11 months in detention in the United States, I wish to return to Haiti. My decision is based on the fact that, over the past month, I have become very depressed and ill and have not been able to receive medical treatment.
>
> I wish to state that this decision to leave in no way indicates a change from my previous position of fearing political persecution upon return. I fully expect that I may be mistreated or even killed upon my return to Haiti. However, I would rather die in my own country than remain any longer in prison in the United States without any indication that I will ever be released. (Affidavit of Haitian who "voluntarily" departed.)

Such a result produced by prolonged imprisonment would be inconsistent with the domestic and international legal obligations not to return persons to territories where they would likely suffer persecution as refugees. See 8 U.S.C. Section 1253(h); Article 33 of the Protocol relating to the Status of Refugees.

THE LIKELY IMPACT OF THE INVOCATION OF THE INTERDICTION POWER

Interdiction, the apprehension of aliens in vessels coming to the United States, is a radical departure from current inspection and inquiry procedures which afford an alien the opportunity to present his or her case, through counsel, to an immigration judge.*

Interdiction would violate the obligations under Section 243(h) of the Immigration and Nationality Act and its international law correlative -- Article 33 of the Protocol Relating to the Status of Refugees, to refrain from

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* Sections 235 and 236 of the Immigration and Nationality Act.

retoulement. This is the duty to not expel or return a refugee to the frontiers of territories where his or her life or freedom would be threatened on account of race, religion, nationality, or membership in a particular social group or political opinion. A refugee who would experience persecution might be returned upon interdiction without any recourse simply because of an inability to articulate the reasons that persecution is feared, or to persuade the on-ship inspector that the fear is well-founded, or because he or she is afraid to speak to authorities. This is particularly so as there would be no access to counsel under these circumstances.

A refugee fleeing persecution after a stressful and surreptitious journey often lacks the documentary resources, the psychological reserve, and even perhaps the willingness to persuade someone then of the *bona fides* of an asylum claim. Indeed, the Handbook emphasizes the difficulties experienced by aliens in pursuing asylum at a national border:

> It should be recalled that an applicant for refugee status is normally in a particularly vulnerable situation. He finds himself in an alien environment and may experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign country, often in a language not his own. His application should therefore be examined within the framework of specially established procedures by qualified personnel having the necessary knowledge and experience, and an understanding of an applicant's particular difficulties and needs (Paragraph 190.)
>
> A person, who, because of his experiences, was in fear of the authorities in his own country may still feel apprehensive vis-a-vis any authority. He may therefore be afraid to speak freely and give a full and accurate account of his case (Paragraph 198.)

The proviso in the interdiction provision about taking measures "to protect the rights of refugees" simply fails to address these concerns.

The only experience to date with an interdiction program, the government's Haitian program, indicates that these concerns cannot be properly met in the interdiction context, particularly in view of the lack of access to counsel, use of personnel not trained in refugee recognition, presence of on-board representatives of the government of claimed persecution, and the effectively non-reviewable character of the process. If it is deemed necessary to control the influx of large numbers of aliens, it must be done in a way that does not deny the rights of those entitled to refugee status, and that permits them a fair opportunity to have their claims determined.

A SUGGESTION

Rather than to focus so emphatically upon deterrence, one possible approach to the problem of mass refugee influxes could involve a more generous use of the parole power to respond temporarily to the influxes, coupled with international arrangements to ensure that an undue burden does not fall upon any particular country.

The parole power, under Section 212(d)(5) of the Immigration and Nationality Act, as enacted in 1956, has traditionally been used to bring groups of refugees into the United States. That provision was utilized in 1956 to bring to the United States over 30,000 Hungarian refugees who had fled to Austria after the unsuccessful revolution in Hungary in October of 1956. H.R. Rep. No. 96-608, 96th

Cong., 1st Sess. 3 (1979); Library of Congress, U.S. Immigration Law and Policy 1952-1979 18 (1979). Subsequently, large numbers of Cuban refugees were paroled into the United States by the Attorney General after the fall of the Batista government in late 1959. H.R. Rep. No. 96-608, supra, at 4; Library of Congress, U.S. Immigration Law and Policy 1952-1979, supra, at 23, 24, 46.

In 1965, a provision was added to the Act,* permitting "conditional entries" for aliens who had fled a Communist or Middle Eastern country, or who were the victims of a national calamity. After two years in such status, aliens were permitted to become residents. The provision, however, proved inadequate to accommodate the large influx of refugees. Consequently, parole was then needed in the 1960's and early 1970's to bring additional refugees -- Chinese from Hong Kong and Macao; Czechs; Jews from the Soviet Union; and Ugandans. More recently, parole was used for Chilean refugees, Cuban prisoners, Latin American refugees and detainees, and over 250,000 Indochinese refugees, particularly after the fall of Vietnam and Cambodia in 1975. H.R. Rep. No. 96-608, supra, at 5; Library of Congress, U.S. Immigration Law and Policy 1952-1979, supra, at 77.

The ad hoc use of the parole power to accommodate groups of refugees lead to the enactment of the Refugee Act of 1980, which was designed "to establish a coherent and comprehensive U.S. refugee policy." H.R. Rep. No. 96-608, supra, at 1. In that connection, Section 207 of the Act was added to establish a systematic procedure for the screening and admission of refugees from abroad and, at the same time,

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* Former Section 203(a)(7) of the Act.

Section 212(d)(5)(B) was added to restrict the Attorney General's parole power with respect to bringing in groups of refugees.* The parole power, however, could be utilized, as it has been in the past, to stabilize temporarily mass refugee influxes on an emergency basis, coupled with international arrangements so that an undue resettlement burden would not fall upon any particular country. Such a procedure might be responsive to the problem without diminishing the rights of asylum applicants.

CONCLUSION

The emergency powers sought with respect to interdicting and detaining arriving aliens would violate the entitlements of asylum applicants under domestic and internationational law. The powers are a radical divergence from traditional policy and practice. A solution must be devised to the problem of mass alien influxes that does not impinge upon the rights of asylum applicants.

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* Currently, the parole power cannot be utilized to bring a refugee in the United States unless "the Attorney General determines that compelling reasons in the public interest" with respect to a particular alien requires parole in lieu of admission as a refugee. 8 U.S.C. Section 1182(b)(5)(B)

Senator SIMPSON. Thank you, sir.
And now, please, Wade Henderson; it is nice to have you here.

STATEMENT OF WADE HENDERSON

Mr. HENDERSON. Thank you, Mr. Chairman. Again, it is a pleasure to come before you to discuss the topic of Presidential immigration emergency powers and the draft Immigration Emergency Act which the Reagan administration has submitted for your consideration.

The American Civil Liberties Union has a deep commitment toward the difficult task, as you know, of reforming the Nation's immigration laws, and we would hope that we could continue our work with the subcommittee, as we have done over the last several months.

We are, however, particularly concerned about the topic under discussion this afternoon. The use of expanded Presidential powers in a time of war or national emergency has a very troublesome history in our Nation. And whether it be President Lincoln's suspension of habeas corpus protections during the Civil War or the detention of Japanese Americans during World War II or President Truman's effort to seize production authority of the steel mills during the Korean conflict, the use of emergency decree by the President has always seemed to warrant the most careful legislative and judicial scrutiny.

Now, we have before us the Immigration Emergency Act. It appears that the Reagan administration is seeking broad authority from Congress for substantial changes in the handling of the mass migration of refugees, using as a basis for their concern the Cuban flotilla of 1980.

This afternoon we have heard much testimony which cites the mass migration of Cubans as being a major cause of concern and something that obviously we as a nation need to prepare to address in the future. Yet, no one seems to have mentioned the role of our own Government in enticing or inducing the Cuban mass migration to take place in the first instance, and therein lies part of our concern overall with the nature of this legislation.

The thrust of these proposals is intended to address problems of administrative efficiency in the processing of refugee asylum claims and would authorize interdiction of vessels traveling with aliens by sea. However, the proposals are far more than a mere administrative adjustment or a codification of current law and regulation, and the issues raised, we think, have far-reaching significance not only for aliens but for citizens as well.

The Emergency Act draft that we have seen represents a sweeping grant of power to the President to suspend the Constitution in the name of efficiency. The bill is intended to respond to the emergency situations that we have talked about and would allow the President to unilaterally declare an immigration emergency. It would authorize restrictions on the rights of citizens to travel both internationally and domestically, and authorize interdiction and indeterminant detention. But most importantly, it would strip the Federal courts of their jurisdiction to review the reasonableness of provisions under the act itself.

We think this is gravely troubling because the potential for abuse of broad Executive authority to override constitutional protections is indeed very grave; and one of the major deficiencies of this bill, notwithstanding the stripping of the Federal courts, is the failure to include an oversight role for the Congress to monitor the effectiveness and implementation of these provisions.

The Presidential authority to detain aliens proposed by the act is very similar to, we think, the title II provisions of the Internal Security Act of 1950—that emergency detention act which established detention camps in the United States during the Korean war to detain persons that the Attorney General considered likely to engage in certain future illegal acts.

This legislation was passed during the McCarthy era and it was focused, in part, on the kind of hysteria that was generated in the concern for aliens and the role of citizens in involvement with national security problems. Suspicious individuals or citizens could be held without charge, without trial, without conviction by a court. The repeal of this effort was successful in large part because of the memory of the U.S. experience with Japanese American internment under Executive Order No. 9066.

The draft bill that is now before the subcommittee could once again subject aliens to unlawful detention, we believe, solely on the basis of their nationality. Several components of the bill are particularly vague and problematic.

The bill would allow the President to declare an emergency if, in his judgment, and without confirmation or review by the legislative or judicial branch, a substantial number of undocumented aliens have or will embark for this country, and that the procedures of the current Immigration and Nationality Act or the resources of the Immigration Service are deemed to be inadequate to respond to the influx.

The triggering criteria for determining when the declaration of an emergency would be appropriate is totally unspecified. It appears that maximum discretion has been reserved for the President without any indication of the essential data to be used in reaching his judgment or the roles of other executive branch agencies in documenting the validity of the emergency.

Critical terminology in the bill is left almost totally undefined. The terms "substantial number of aliens" and "normal procedures of the INS," which are keys to any comprehension of the conditions requiring a declaration of the emergency, are critically vague. And there really is little possible understanding of objective criteria to be used in reaching a decision which can be gained from the bill itself.

The vagueness of these key provisions appears designed to provide the broadest scope of coverage and latitude for the President, without any oversight and review. The failure to use numerical criteria also permits the declaration of an emergency where only literally a few thousand aliens are involved. That kind of latitude, that broad range of discretionary power, would pose a serious potential for abuse.

The primary consideration to be used in determining the existence of a valid emergency would be whether normal procedures of the INS are adequate to the anticipated task. Now, this most cru-

cial judgment would be made with neither legislative nor judicial scrutiny or review of the decision, and the underlying question of the preparedness of the INS to administratively handle mass asylum determinations and the effectiveness of existing determination procedures to expeditiously and fairly process individual claims is certainly more within the control of the President and the Congress than the passive terminology of the bill would seem to imply. Reliance on this rationale alone for defining the existence of an emergency, we think, is highly questionable.

There are numerous other civil liberties considerations with respect to the bill, including the international travel restrictions. And we understand, of course, that there are major distinctions from a constitutional standpoint between the right of citizens to travel domestically and internationally. Nonetheless, we are deeply concerned about these provisions.

We, of course, are deeply troubled about the interdiction provisions because they would seem to request a congressional license to violate international law by eliminating the necessity for bilateral treaties for such actions, and replacing them with some sort of vague standard for the unilateral exercise of Presidential authority.

There are questions about probable cause standards, equal protection in the application of standards, first and fourth amendment protections to be afforded to those persons who are stopped in the process. There are problems with respect to our commitments under international agreements, including U.N. protocol relating to the status of refugees.

There are major problems, of course, with the judicial review provisions, and I will not continue. I will simply summarize.

Senator SIMPSON. Thank you.

Mr. HENDERSON. We do have a number of grave concerns. What we would hope to do is to augment this statement with a major statement for the record. This testimony has been presented only as a preliminary statement on behalf of the ACLU.

Senator SIMPSON. Without obection, so ordered.

Mr. HENDERSON. Thank you.

Senator SIMPSON. Thank you.

I will just ask some questions and start down the line, if I might, first with Mr. Torres. The section-by-section analysis that accompanied this bill indicates at least, I think, an application to the Caribbean. Does not any possibility of this applying to the Mexican border situation appear remote?

Mr. TORRES. No, because as the Commissioner of the INS indicated, it could easily be applied to situations where there are a few thousand undocumented aliens. Also it is very unclear as to who is going to initiate the process to decide whether emergency powers should be applied.

Is it going to be like the disaster relief program we have now? In other words, if the State of Texas or the State of Arizona or California or some Southwest State says, "I have got a tremendous flood of undocumented people coming across the border and they are depressing the markets along the border of my State; I have serious difficulties and I think that emergency powers should be

applied to this situation," you have a totally different situation taking place.

The bill never indicates whether it will only apply to countries in the Caribbean. Again, you do have that strong, strong public outcry, as you well know, coming from the Southwest. It could easily be interpreted as, anytime you have a peso devaluation crisis, the provisions of the bill could be applied because these State governments feel the need to stop the flow of undocumented workers. I think you know Governor Clements better than I do in that regard.

Senator SIMPSON. Well, you and I both have come to know the Governor and some of his comments with regard to immigration matters. You know, he has some very rich and deep views on that, indeed.

You raise the point that the emergency declaration by the President may, just like the designation of a disaster area by an administrative official or a Governor, evolve as a semiautomatic response kind of thing to gubernatorial or congressional concern.

What suggestions do you have for us that we could use to try to prevent that?

Mr. TORRES. Well, I would not be interested in making suggestions to legislation to prevent that from happening. My interest is making sure that there is no movement to legislation of this nature. I think that the best thing to do is some of the things that I previously summarized in my opening oral comments. That is, if the legislation in Congress passes then it should be given the opportunity to be implemented and function, and assessed as to its effectiveness in accomplishing its proponent's claims which is to stifle the flow of illegal immigration.

In addition, some of the trigger criteria contained in this bill indicate that there are serious resource problems for the INS. Again, attention should be focused on that whole issue.

The serious discussions that must be undertaken with countries—I think Mr. Henderson has indicated that our posture with certain countries has, in fact, stimulated the flow of people here. Certainly, in the case of Haiti, we are in a much better position to influence and work with that Government to stop that kind of situation from happening.

The other issue is simply the fact that we really should develop much better economic programs to deal with those impacted States and areas of countries that are sending most of their people to the United States.

I think that is, again, I emphasize, a much better way of dealing with the issue, getting perhaps the United Nations involved again, than coming in with a piece of such far-reaching legislation. Clearly, this bill, as evidenced by this panel's comments, is not that concerned with the rights of individuals, not only those who are potential American citizens or those who are going to apply for citizenship, but those who are in the country already who simply are going to be viewed as potentially undocumented or red meat for questioning.

You know, I think that the bill does not have enough protections in that sense, and I just do not want to get into a whole Pandora's box in that area.

Senator SIMPSON. Well, if the other legislation should pass, then you will be coming back to share with us your views as to how best this legislation might work. Is that correct?

Mr. TORRES. Well, if the legislation on the table now passes, which many of us feel there is a 50–50 chance of right now in the House if we continue to work well, yes, we certainly will come back and work with you.

Senator SIMPSON. It was 100 to 1 when you were not working.

Mr. TORRES. Yes. [Laughter.]

But, anyway, if it does, we certainly will come back to see if we can improve on provisions of the law that deal with minimizing the flow of undocumented people to the United States.

Senator SIMPSON. One other question, in all seriousness. We have these witnesses that testify, not today but other days; Latin American experts and authorities, and so on, testifying—and this is not new to you either, I know—that there are perhaps another 200,000 to 2 million potential Marielitos in Cuba whom Castro has designated or considers exportable.

How is this Nation to respond to that type of intelligence that is presented to us, and that there is no plan, perhaps——

Mr. TORRES. Well, I think that——

Senator SIMPSON. Wait.

Mr. TORRES. I am sorry.

Senator SIMPSON. There is no plan to do that yet, but there was no plan to do it with the Marielitos; it was just a combination of foreign policy issues, internal, and so on. So, how are we to respond as a thoughtful nation to that without something like emergency powers, whether it is this or something else? I mean, that is where we are; it is kind of the nub of it.

Mr. TORRES. I think a member of one of the previous panels, Professor Maier, indicated that he felt that there were already existing powers to some extent that could address situations of that nature.

But more important, to expand upon that, is the need to have a foreign policy with regard to relations with Cuba that is going to work to avoid that from happening. I think that is probably the key. You are really dealing with a foreign policy issue in that sense, and to draft legislation of this nature is not really efficient, nor is it a good public policy precedent to be setting.

I agree that something must be done to keep Florida from having to be confronted with such intense flows of people as it was under the Mariel boatlift. But at the same time, it is our foreign policy that probably is going to make it or break it. I would just as soon be able to be in a preventive posture through more effective foreign policy and international pressure on Cuba than to be responding to a crisis with such questionable public policy legislation as this.

Senator SIMPSON. Thank you.

Mr. Helton, was a lady named Harriet Rabb involved with your process up in New York? Are you aware of her?

Mr. HELTON. Yes; she was counsel on a litigation concerning a number of detained Haitians in New York City.

Senator SIMPSON. I had a fine visit with her many weeks ago and I wondered if she was not part of this same—is it the same?

Mr. HELTON. We are allied as co-counsel in that case.

Senator SIMPSON. I was interested in that. Thank you.

Would you give us your views of the interdiction questioning procedure? Do you have any suggestions that could assist in improving it or making it fairer? I would be interested.

Mr. HELTON. Well, I question whether or not interdiction can be made a fair procedure for the presentation of a claim for political asylum. Asylum applicants frequently find themselves at the border after a harrowing escape from persecution, without the benefit of documentation in the form of a passport or visa. And in the context of an interdiction, that process will be telescoped, as is reflected in the only experience that we have had with interdiction, which is the U.S. Government's Haitian interdiction program. It has been telescoped into brief interviews before personnel who have received no specific training in refugee recognition, who presumably are in a situation where the representatives or military officials and personnel from the Government of claimed persecution can participate in some respect in the process, and indeed where there is no access to counsel.

It is an impossible request to comply with, should the alien or applicant for political asylum request counsel. Under those circumstances, I question whether or not an interdiction procedure could ever provide a fair opportunity to present and have considered a claim for political asylum on the part of an undocumented alien who is the subject of an interdiction.

Senator SIMPSON. What has been the impact of detention upon the Haitian asylum applicants? You know, I know what you testified to and the particular quotation of the one gentleman who said he received no medical attention and that he would go back, and so on. I would be interested to know where that occurred, but that can come in another place.

I appreciate that you do not favor detention, but can you give us your estimate of the impact of detention upon Haitians who are contemplating coming to this country? Of course, you are aware that in Hong Kong, the British have now begun a detention program, and also, of course, began many months ago an identification system, and so on. What are your thoughts on that?

Mr. HELTON. I do not know, and really cannot know, what impact a detention program would have on an alien contemplating fleeing persecution. My instinct is that that is a decision simply made in the immediacy of that circumstance, and the escape occurs and the alien is in flight.

My particular concern, and the concern of the Lawyers Committee, is that once here, what is the United States doing that may coerce that alien who has applied for political asylum into giving up that right. That is the context in which I see the risk of detention to the entitlements of asylum applicants.

Senator SIMPSON. Is there any element, with our policies in this country, of in some way coercing, in a sense—I use the word carefully—the economic migrant to seek asylum?

Mr. HELTON. I do not think that one can describe the current immigration law as an invitation to aliens to apply for political asylum when those claims are frivolous. Should that occur, there are adjudicatory procedures that resolve that issue relatively quickly.

However, where there is a well-founded fear of persecution, I think it is paramount to guard against any procedures or incentives that will discourage compliance with the obligation of the United States to recognize that well-founded fear of persecution and accord asylum.

Senator SIMPSON. Of course, the interesting dilemma is that if that same person went into the consular offices—a Haitian, say, went into the consular offices at Port-au-Prince and sought to say the same things he says up here in America, a consular official just stamps it and says "sorry," and that is it. Yet, when they come here illegally, it is almost as if the minute they leave their shore, they gather unto themselves more degrees of due process than would have ever been imagined by the average American citizen.

In the final touch of it all, they end up in many cases with more due process than an American citizen might obtain. That is a curious anomaly as we deal with the refugee Haitian asylee issue, and will remain so to me—how we can hang up on the area of judicial review when down there at home base, it is just bam, like that. You know, that makes me scratch my dome somewhat.

Mr. HELTON. There are certainly, it seems to me, illogical aspects of any system of law. However, I think in part, by definition, under international and domestic law, Mr. Chairman, the fact that an alien arrives here does confer benefits in the form of entitlements to apply for political asylum which an alien in the country of nationality, just by definition, does not have.

In fact, experience indicates that the kinds of aliens who apply for political asylum frequently or ordinarily do not make prior applications to consular offices, simply because they flee without the benefit of documentation and are prompted to flee under relatively urgent circumstances. They are not in a position to await a consular determination.

Senator SIMPSON. Thank you.

Mr. HELTON. Thank you.

Senator SIMPSON. Mr. Henderson, do you conceive of any circumstances other than in times of war when the United States might exercise emergency powers, and if so, what would those be?

Mr. HENDERSON. Well, certainly, Mr. Chairman, in times of major national disaster, destruction, flood, or a major civil disturbance where the rule of law may have broken down in a way that would prevent orderly processes from taking place, the appropriate terminology of an emergency situation may well be applied to those circumstances.

I think we certainly concur with the observations made by one of the professors on the earlier panel that the terminology "emergency" may well be inappropriate to apply to the kind of situation which this proposed draft legislation is intended to address.

In large part our concern—again going back to the ambiguity of terms, it would seem to allow the President and the Congress, who have relative control over the administrative process of the INS by way of appropriation and regulation, to therein suggest that because the system as it presently stands is incapable of accommodating an anticipated influx without having the specificity to know how the interplay of actual administrative process and the number of aliens who might be coming in and affecting that system—how

they will interplay with one another—that seems to us to present a situation where potential abuse is likely to occur. And therein, I think, lies the grave problem that we see with the proposed bill.

We certainly do believe, though, that circumstances could exist where it would be most appropriate to declare a national emergency under circumstances such as those I have just mentioned.

Senator SIMPSON. Now, we have the existing International Economic Emergency Powers Act. Do you have opposition to that in itself, the present one?

Mr. HENDERSON. No, Mr. Chairman. We have not taken a policy position on that at this time. We may, in fact, respond to that in our statement, but at this time we do not.

Senator SIMPSON. Let me ask you, do you think that President Carter's actions under that International Economic Emergency Powers Act during the time of the Iran hostage crisis was proper? I might ask that.

Mr. HENDERSON. Well, Mr. Chairman, again, without policy positions to formally support the statements, I would not want to be misinterpreted as giving the solid posture of the ACLU on that question.

I think we were troubled, however, that there were obviously a number of serious foreign policy considerations which had direct impact on the President's decision on how to treat Iranian students in this country and punitive measures with respect to the use of the INS to search visas and determine the eligibility of students who had participated in political demonstrations against the regime.

Much of that, of course, was, we thought, overtly political and therefore very troubling. Other elements of the President's action during that period, I am not familiar with and could not really respond satisfactorily.

Senator SIMPSON. Well, as we proceed in this—and the House will begin to process, I think, emergency powers legislation, too, in the next session—we will appreciate, as we have in the Immigration Reform and Control Act, your thoughts and your suggestions on what might be acceptable and unacceptable.

I think you have always had that access. I know you may not always agree with the final product, but I promise you, you will always have that access. That is as important to me as it is to you.

Mr. HENDERSON. Thank you, Mr. Chairman.

Senator SIMPSON. So, I thank you very much. I appreciate your testimony and thank you for coming.

That will conclude the hearing on emergency powers for today. Thank you very much.

[Whereupon, at 4:43 p.m., the subcommittee was adjourned.]

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